Supreme Court, U.S.
FILED
001300 FEB 15 2001
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No. _____

In The
Supreme Court of the United States

Douglas Paul Dodge,
Petitioner(s)
v.
Kathryn Lucille and Donald Graville,
Respondents

On Petition For Writ Of Certiorari
To The Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Questions

The following questions arise from a grandparent visitation court order setting up a court ordered psychologist to treat the children involved over the objections of the parents.

1. Is a trial court's order in a third party visitation litigation, which orders a psychologist to intervene in the relationship of a parent and child in order to alter the child's attitude concerning the third party, an unconstitutional infringement on a fit parent's right of custody and control under the 14th Amendment of the US Constitution?

2. Is Arizona's third party visitation law, A.R.S. §25-409, an unconstitutional infringement on a fit parent's right of custody and control?

3. Does the above-mentioned order of a trial court violate due process and equal protection safeguards when only one of two legal parents is party to the litigation?

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Citations of the Published and Unpublished Opinions in this Case

January 6th, 1998 Court Order signed by the Honorable James Keppel, Maricopa County, AZ, Superior Court

Minute Entry Maricopa County Superior Court dated December 9, 1998, Judge Cheryl Hendrix

Opinion Division I of Arizona Court of Appeals, *Dodge v Graville I*, January 28, 1999

Minute Entry Maricopa County Superior Court dated March 5, 1999, Judge Cheryl Hendrix

Minute Entry Maricopa County Superior Court dated May 17, 1999, Judge Cheryl Hendrix

Court Order signed September 20, 1999 Maricopa County Superior Court by Judge Cheryl Hendrix

Petition for Review (of *Dodge v. Graville I*) denied in Arizona Supreme Court September 24, 1999

Minute Entry Maricopa County Superior Court dated September 29, 1999, Judge Cheryl Hendrix

Memorandum of Decision (unpublished) rendered on November 26, 1999 (*Dodge v. Graville II*) 1-CA-SA 99-0235

Opinion in *Dodge v Graville III* rendered May 23, 2000

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Statement of Jurisdiction

On December 7, 2000, the Arizona Supreme Court denied without comment to review a published earlier opinion by Division I of the Arizona Court of Appeals in the case of Kathryn Graville et vir. v. Douglas P Dodge, CV-00-0225-PR. The petition for review initially resulted from an opinion that was entered by the Arizona Court of Appeals, Division One, in the case of Graville v. Dodge, No. 1 CA-CV 99-0582 (Ariz.App.Div.1 05/23/2000), which was in response to an appeal from an order by the Superior Court in the same matter, DR 97-90192 (see in the Appendix, Order by the Honorable Judge Cheryl K Hendrix, Superior Court of Maricopa County, Arizona). The United States Supreme Court has jurisdiction in this matter under rule 11(c).

> "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or[and] has decided an important federal question in a way that conflicts with relevant decisions of this Court." [added by Petitioner to clarify the claim]

It is Petitioner's contention that this action has violated his constitutional right to due process under the 14th Amendment of the U.S. Constitution, and should be reversed. It is clear that, at least as far as the instant case, no Arizona court is willing to defend or even recognize

the right of a parent to custody and control of his children. Without intervention in this matter by the United States Supreme Court, this right effectively does not exist in Arizona in the instant case and other cases within Arizona.

Notice of Service Pursuant to Rule 29

This document has been served by mail on the attorney of record for the opposing party and personally on the opposing parties themselves. In addition, since the constitutionality of a state statute may be in question, this was also served by mail on the Attorney General of the State of Arizona pursuant to 28 U. S. C. § 2403(b). Proof of service accompanied this document when it was filed with the United States Supreme Court.

Material Facts of the Case

Douglas Paul Dodge (Petitioner) and Gayla Graville were married in March 1988. This union resulted in the birth of two children, Victoria and Amanda (whose name was legally changed from Casey in a subsequent adoption). Douglas Dodge, a Sergeant in the U.S. Army, was subsequently assigned to duties (Sinai peacekeeping force and Desert Storm) which prevented cohabitation for long periods of time. During these periods, the mother (Gayla) often resided with the minor children at the home of her parents, Donald and Lucille Graville, the Respondents herein.

At or around the birth of the second child Amanda (now 10 years old), Gayla contracted what proved ultimately to be a fatal renal disease. After Desert Storm, Gayla moved from the

family home near Sergeant Dodge's duty station at the Aberdeen proving ground in Maryland to her parent's home in Mesa, Arizona. She subsequently sought a divorce from Dodge, and shortly remarried. Gayla's second marriage lasted two years and ended in divorce. During this time, the children moved often, which also included a period of residence in the home of the paternal grandparents. Eventually, in 1996, Gayla died suddenly from complications associated with her renal disease.

Several years after the divorce, Sergeant Dodge met and married Andrea McAllister. He separated from the Army and, after a brief stay in California, pursued a career in law enforcement in Arizona. As a result of the untimely death of Gayla, he suddenly became the sole custodial parent of his two children, Victoria and Amanda, and was aided by his wife, who was then the stepmother and who has since legally adopted the girls. Substantial visitation continued with the maternal grandparents until problems began to occur, which was of sufficient seriousness that Dodge felt it necessary to temporarily suspend visitation with the genetic grandparents.

After the 90-day period required by Arizona law (A.R.S. §25-409), Respondents petitioned for Court-ordered visitation. A bench trial occurred in late 1997 and, in 1998, an order was entered ordering visitation.

During this action, Douglas Dodge's ability as a parent was not questioned and his fitness

as a parent was stipulated to by Respondents on several occasions (see one instance in the Appendix). Dodge, with his new family, established a home in Surprise, Arizona near where he was employed as a peace officer in Peoria, Arizona. With his wife, Andrea, he initiated a petition for Andrea's adoption of the children, and the adoption was granted in March of 1998. At that time, both girls desired to have their names changed, with Victoria dropping her middle name and Casey changing her name to Amanda. The Respondents refused to call the children by their legal names[1]

Dodge appealed the trial court order on several grounds, including the fact that Arizona's law was an unconstitutional infringement on his 14th Amendment right to due process. In its ruling on that appeal, the Arizona Court of Appeals upheld the constitutionality of Arizona law based on a standard that the statute presented a minimum intrusion into Dodge's right. However, significant portions of the trial court's order were stricken as being unconstitutional as applied because they were too intrusive into Dodge's right of custody and control. One of particular relevance to the instant case was a provision that prohibited Dodge from discussing the court actions with his children nor to say any-

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[1]See Reporters Transcript on hearing held 9/11/98 pp.26-27(excerpt in Appendix)

thing disparaging concerning the Respondents. Dodge petitioned the Arizona Supreme Court to review this opinion, which was denied in September of 1999.

While the appeal was pending, the Respondents filed a contempt action. This action resulted in another bench trial and, in September 1999, a court order was issued, referred to here as the Hendrix Order (see the Appendix), which was a mixture of purge orders dealing with a finding of contempt and which included additional, new orders. During this action, there was no independent evaluation of the children by an independent medical or psychological professional, and it is undisputed that there was no court or psychologist examination of the children of any kind (see footnote 6 of the Appeals opinion[2] [referred for clarity subsequently as *Dodge v. Graville III*]). Because the appeal was pending, the trial court did not have access to even the scant records of any psychologist examinations of the children (the only one being a brief one-half hour examination which occurred two years prior).

Dodge appealed the purge order portion of the Hendrix order under the Special Action provisions of Arizona Rules of Civil Appellate Procedure. The Arizona Court of Appeals, in an

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[2]Dodge v. Graville, No. 1 CA-CV 99-0582 (Ariz.App.Div.1 05/23/2000), contained in the Appendix

unpublished opinion, upheld the finding of contempt by the trial court but struck all the purge sections of the order without remand, effectively leaving a contempt finding without enforcement.

Consequently, and as required by Arizona's rules and case law, Dodge separately appealed those portions of the Hendrix order which were new orders (*Dodge v. Graville III*) . Particularly pertinent to this appeal was a provision in the order that Dodge would be required to take his children to a court-ordered psychologist, Dr. Block, for **"therapeutic intervention"**. This provision seemingly resulted from the testimony of the Respondents that the children expressed to them the desire never to see them again during one of the court ordered visits. The real intention of the court order was disputed by the Arizona Court of Appeals since the term **"intervention"** is generic and not a psychological term without a precise professional definition. Dodge contends that the clear intent is to intervene in his relationship with his children in order to alter their naturally formed beliefs and attitudes about the Respondents rather than provide any beneficial professional treatment for the children.

In the cited opinion, the Arizona Court of Appeals found no constitutional issues in this matter (and indeed saw no legal distinction between parents and grandparents [see footnote 5 of the Court of Appeals opinion, *Dodge v. Graville III*]) and thus chose to decide the case solely on statutory construction grounds. The stated authority by the Court of Appeals for

this **"therapeutic intervention"** was A.R.S. §25-410(B), a divorce statute that does not mention grandparents. The Arizona Court of Appeals, in its opinion, chose to suggest that the legislature must have meant grandparents when it said parents in this statute and, therefore, the court had authority for its actions.

However, Dodge believes that long established precedent upholds his 14th Amendment right as a fit parent to custody and control of his children and, most particularly, in the absence of any independent professional-supporting diagnosis, he should not be forced to submit his children to what he feels is a risky **"therapeutic intervention"** treatment just to assure that his children's attitudes please the court. In addition, Dodge contends that since his wife, the legal mother of the children, vigorously objects to the psychological treatment, and has never even appeared in court, she should not be forced to allow this **"therapeutic intervention"** without any form of due process. Neither the Arizona Court of Appeals or the Arizona Supreme Court chose to give any consideration to either of the Dodges' constitutional rights in this matter.

In the interest of fully disclosing all the facts of this case to this Court, although subsequent events may not be relevant, significant events have occurred since the original action leading to the instant petition: Dr. Block, after a brief interview with Dodge, has withdrawn from the case for unstated reasons. Dodge has moved to another State (Washington) where he is employed

as a peace officer. The Respondents have filed another contempt petition seeking to replace Dr. Block with another psychologist, and Dodge has disputed the jurisdiction of an Arizona court in the absence of any attempt on the part of the Respondents to domesticate Arizona's orders in situ.

Argument for Question 1:

Is a trial court's order in a third party visitation litigation, which orders a psychologist to intervene in the relationship of a parent and child in order to alter the child's attitude concerning the third party, an unconstitutional infringement on a fit parent's right of custody and control under the 14th Amendment of the US Constitution?

"It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children[3]." This case is a long saga of attempts to obtain due process from the Arizona judicial system, attempts that Dodge feels have been consistently thwarted and frustrated. However, while Dodge feels that the previous two

[3]From Troxel v. Granville, No. 99-138. Argued January 12, 2000--Decided June 5, 2000

appeals, two bench trials, and numerous orders have violated his rights under the 14th Amendment, the mere review of these thousands of documents would be daunting to any court or institution and is now untimely.

However, this petition for review is focused on a very narrow subset of the total history of the instant case. As explained above, the Honorable Cheryl K Hendrix, a Superior Court Judge in Maricopa County Arizona in September of 1999 entered a signed order that was a mixture of findings of fact, precatory statements, new orders, and purge orders[4]. Under Arizona case law and the Rules of Civil Appellate Procedure, the purge orders must be appealed under a provision of the Rules of Civil Procedure which offers expedited reviews in the form of Special Actions. New orders, even when co-mingled with other matters, must be appealed separately in an independent appeal. The appeal of the new orders was timely lodged and, in May of 2000, an opinion was released by Division One of the Arizona Court of Appeals as explained previously (this opinion, fully contained in the Appendix, will be referred as *Graville v. Dodge III*). A timely Petition for Review by the Arizona Supreme Court was entered with the Arizona Court of Appeals, as required by Arizona Rules of Civil Appellate Procedure, and, on December 7, 2000, the Peti-

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[4]Full content of this order dated September 30, 1999 is contained in the Appendix

tion for Review was denied[5]. Under Arizona case law, this denial of review confirms the findings of the Division One, Court of Appeals' Opinion, and effectively extends as precedent case law in the state of Arizona.

As to Question #1, this Petition For Writ Of Certiorari is for those aspects of the order that represents new orders, which was denied Certiorari by the Arizona Supreme Court and, in particular, by the following excerpt from the Hendrix order:

> "Pursuant to ARS §25-410(B) Dr. Robert A. Block, PhD is appointed to exercise continuing supervision over this case to assure that visitation orders are complied with and to provide **therapeutic intervention** so that a relationship between the children and the grandparents can be a possibility if not a reality....Dr. Block shall have sole discretion in determining the number of sessions necessary prior to having unsupervised time with the children. To purge himself of the contempt the respondent must pay the required fees and expenses and must cause the children to be available at and to the sessions. " [**emphasis** added to original hand written Hendrix Order]

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[5]See this Document contained in full in the Appendix

Dodge contends that this order is an unconstitutional infringement on his right of custody and control in that his judgment and, by inference, his wife's judgment, as fit parents is not even considered when a court orders treatment, not for the welfare or benefit of the children but, as explained above, to alter an attitude in the children concerning the genetic grandparents that the court did not feel the children should be allowed to hold.

The issue is not how the children obtained this attitude, indeed there is no finding of fact from the court and no evidence on that issue. If there had been evidence that Dodge was somehow responsible for the children's attitude, it is simply not relevant based on no known statute or principle in law that would allow the interference of communication between parent and child. In the previous state court ruling in *Graville v. Dodge I*, 195 Ariz. 119, 985 P.2d 604 (Ariz.App.Div.1 01/28/1999 cert. denied), the Court of Appeals stated that, "the orders impinge directly on Dodge's parental communication with his children. This intrudes directly upon Dodge's ability to exercise parental control and amounts to an unconstitutional exercise of the court's authority granted by the statute." Thus, how and why the children developed their dislike for their genetic grandparents cannot be at issue. What is at issue, however, is whether the trial court may order "therapeutic intervention" or, for that matter, any treatment without first deter-

mining that the parents are somehow unfit (in the instant case, it was stipulated to by the Respondents on several occasions that Dodge is a fit parent [see the Appendix]).

While *Troxel v. Granville* may have added clarity of an opinion from the Supreme Court of the United States, it was admittedly not available when the Arizona Court of Appeals opinion was authored. However, Troxel was available when the Supreme Court of Arizona denied Certiorari. Because it was eminent, it was briefed extensively to the Arizona Court of Appeals (see footnote 2 of the Appeal Court opinion in *Dodge v. Graville III*), who chose not to wait fourteen more days for the issuance of the United States Supreme Court opinion in this case.

However, this case could easily be decided in case law without any knowledge of the recent Troxel opinion. Since 1979, a United States Supreme Court opinion concerning the rights of parents when psychological or other professional treatment is being ordered by the state has been available in *Parham v. J. R.*, 442 U.S. 584, 602. In that opinion, this court found that, "parents -- who have traditional interests in and responsibility for the upbringing of their child -- retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse." This Court went on to find that, "they [parents] retain **plenary authority** to seek such care for their children, subject to an independent medical judgment." [explanation and emphasis added] There was no medical judgment in the instant

case nor any independent examination of the children of any kind (even by a professionally unqualified person) in this case. The children were merely ordered by the court to be taken to a psychologist who was not known by the parties, over the objection of both legal parents, one involved in the litigation and the other one never having been made party to the litigation. The judge, who does not qualify as a competent psychologist, refused to interview the children, and the only psychological examination of the children occurred two years prior in the Keppel trial which was not orientated towards this issue since it did not exist at that time.

We now turn to the Arizona Court of Appeals' opinion, *Dodge v. Graville III*, concerning constitutionality of the order. In ¶ 42 of the attached opinion, the Court of Appeals states, "C. The Hendrix Order is not an Unconstitutional Application of the Grandparents' Visitation Statute." The Court of Appeals, notwithstanding the *Parham v. J.R.* opinion extensively briefed, choose to ignore any constitutional issues other than the amount of ordered visitation time. The Arizona Court of Appeals states in ¶ 44, "The Hendrix Order does not enlarge or significantly alter the visitation provisions we have already approved in the prior appeal", as justification for its statement in ¶ 42, referenced above.

Dodge feels this finding is in error since the Court of Appeals clearly anticipated that any decisions concerning treatment under the order were to be entirely between the court and psy-

chologist, without parental input, when it states in ¶ 26, "However, if the order places Dr. Block in a position where he may be forced to disregard any ethical or professional obligations, Dr. Block may raise these issues with the trial court. Thereafter, the trial court can terminate Dr. Block's appointment, and modify the visitation order, as appropriate."

Dodge feels that case law is clear, that in the absence of any independent evaluation to the contrary, the plenary authority to decide on psychological treatment rests with the parent. Dodge has been found fit during the adoption process, his wife has been investigated by the state and found suitable to adopt the children, and there is no finding of fact anywhere in the record to the contrary. As such, he should not be forced to accept treatment he feels is dangerous and harmful from a psychologist that was, at the time, a complete stranger to Dodge and his family.

The U.S. Supreme Court should accept this case to prevent such intrusions into the family becoming accepted case law in Arizona, and conceivably nationwide. Without Supreme Court intervention in cases such as this, a fit parent's right of custody and control of their children becomes a hollow right. Especially when state courts are unable or unwilling to distinguish between parents and other third parties, such as the Arizona Court of Appeals did in the instant case when it stated, "The best interests of the child are not well-served by an interpretation of

§ 25-410 that conditions assistance for visitation upon the identity of the party making the request for help.[6] "

Clearly the Court of Appeals in the instant case is unable or unwilling to distinguish between legal parents, protected by the 14th Amendment, and other third parties with no such protection in statute, common, or constitutional law. By this opinion, court ordered **therapeutic intervention** could, at the discretion of the court, be applied at the behest of any individual, independent of their relationship with the children or language of the statute based only on what the court opines is in the best interests of the children, with no consideration of the parent's opinion whatsover. Without correction, the distinction between parents and grandparents, teachers, social workers, etc., declared often by the United States Supreme Court, becomes a hollow distinction in any real practical terms.

Arguments Question 2:

Is Arizona's third party visitation law, A.R.S. §25-409, an unconstitutional infringement on a fit parent's right of custody and control?

Arizona's third party visitation statute structure consists of two statutes, A.R.S. § 25-409

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[6] See footnote 5 in *Dodge v. Graville III*

and A.R.S. §25-415, the first covering genetic grandparents and the second extending visitation to all other individuals who might claim a close relationship with the children in question. The instant case has been conducted entirely under the authority of A.R.S. §25-409 since the Respondents are the genetic grandparents (if not legal grandparents having this status terminated by adoption). If the statute were facially unconstitutional or unconstitutional as applied, then no enforcement action or new order contemplated under the Hendrix order would be lawful. Troxel v. Granville recently dealt with, in detail, the issue of grandparent visitation. The case law foundation for tests of constitutionality of Arizona's grandparent visitation law rests with *Graville v. Dodge I*, where Division I of the Arizona Court of Appeals found,

> "Thus, when a law does not substantially infringe upon a person's fundamental rights we examine the challenged statute under the rational basis standard of review. That is, we will uphold the law if it is reasonably related to a legitimate state objective..... Examining A.R.S. section 25-409 with this principle in mind, we conclude that its provision for grandparent visitation does not substantially infringe on parents' fundamental rights."

This finding was referred to (see footnote 2)

as the basis for finding that there were no constitutional issues in the instant case and thus, by reference, extends that opinion to the reasoning in the instant case. This finding appears to be in conflict with *Troxel v. Granville* where the United States Supreme Court stated:

> "The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham, supra*, at 602. In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters."

It may be that this difference may be credited to the selection of an incorrect standard of review by the Arizona Court, ignoring Justice Thomas's observation in concurring in *Troxel*, "I would apply strict scrunity to infringements of fundamental rights."

It is hard to distinguish the instant case on the record from that of Tommie Granville (Wynn), leaving Dodge with a sharply different outcome for indistinguishable facts. Visitation was never completely denied, just suspended when problems arose. The court gave no weight to Dodge's opinion of what was in the best interest of his children. The final decision was merely reduced to the Judge's opinion versus the parents, with

the judge prevailing.

Further, similar to the statute in Washington state, Arizona's statute is "breathtakingly broad", albeit spread over two statutes, and provides no provision for any weight to be applied to the parent's opinion, suggesting that the only factor to be considered is the "motive of person denying visitation[7] " concerning the best interests of their children.

There is no requirement of any kind for the court to find that harm would result if the parent's opinion prevailed. Thus the parent is forced to argue why visitation should not be granted contrasted to the grandparents and other third parties merely proving their status as grandparents, ex-boy and girl friends, etc., to justify their claim for visitation. In contrast, divorce cases under A.R.S. §25-411 require the complaining parent to attend a pre-hearing to justify a reasonable change to their visitation status before best interests may be considered, yet grandparents and other third parties under A.R.S. §25-409 and 25- 415 are required to prove nothing except their status.

As we have explained above, the order in

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[7] see this and a companion and virtually identical provision applying to grandparents in ARS §25-409 illustrating the chasm between the Troxel wording requiring "special weight to the parent's opinion" and this statute requiring identical evaluations of motives of both parties.

the instant case completely ignores any parental input to psychological treatment of the children. Thus, Dodge feels that the Arizona Statute is unconstitutional on its face and is certainly unconstitutional as applied to his case. Thus, the entire action that led to the Hendrix order is unlawful and the Hendrix order should be overturned for that reason alone.

Arguments for Question 3:

Does the above-mentioned order of a trial court violate due process and equal protection safeguards when only one of two legal parents is party to the litigation?

Dodge argued that the legal mother (by adoption) to these children has never been made a party to this litigation. Certainly all the orders in this case, but most specifically the Hendrix order, interferes with her right of custody and control. The Arizona Court of Appeal in ¶ 26 of its opinion in *Graville v. Dodge III*, stated,

> "Dodge further asserts that Dr. Block's court-ordered duties present an ethical dilemma for him because they ..... (ii) force him to encourage the children's visits with the Gravilles in violation of a psychologist's obligation to respect a parent's judgment regarding the treatment of a child.... However, if the order places Dr. Block in a position where he may be

> forced to disregard any ethical or professional obligations, Dr. Block may raise these issues with the trial court."

There is clearly no room in this pronouncement for the Mother's opinion as to what is in the best interest of her children.

While some might contend that this issue is not properly before the court, Dodge disagrees First the fact that the mother is not a party is solely due to the court's refusal, on two occasions, to join the legal mother in the litigation or to provide alternate due process to her as a matter of equity. This is not, however, a petition to protect the rights of the Mother but rather to protect the Father's right to have the court recognize the impact of him now having a partner in parenting. In Arizona law, this is a significant matter since A.R.S. §25-409 does not recognize the right to petition the court when a family is intact. Despite a clause in the statute [ARS §25-409(D)] that some interpret as somehow making stepparent adoptions to be second class, there is no credible argument for treating such adoptive parents unequal under the law. After the adoption took place, these children had two legal parents. The equal protection clause of the 14th Amendment requires that the Father no longer stands alone and the court should not place the Father and Mother at odds: one under a court order to harm his children by visitation with individuals he feels will undermine the children's mental well being; the other free from court ordered behavior, commanded by law to do

what she feels is in the best interests of the children.

Equitable treatment as well as good judgment demands that this change of status be recognized by the court, since it leaves the court making orders based on a fictional case with similar facts to the instant case, missing the reality of the family unit.

The United States Supreme Court states in *Quillion v. Walcott* 1978.SCT.217, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 in quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 :

> "We have little doubt that the Due Process Clause would be offended " [if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

The United States Supreme court continues in that case by stating that, "the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned." The *Quillion* case was that of an adoptive stepparent, as is the instant case, and the state has demonstrated no rational reason that stepparents do not deserve equal protection to that afforded other adoptive parents.

The United States Supreme Court has long

recognized that equal protection applies to adoptions. In *Lehr v. Robertson*, 1983 SCT. 2578,463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614, 51 U.S.L.W. 5010, Justice Stevens in delivering the opinion of the court stated:

> "We have held that these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child. In Caban v. Mohammed, 441 U.S. 380 (1979), the Court held that it violated the Equal Protection Clause to grant the mother a veto over the adoption of a 4-year-old girl and a 6-year-old boy, but not to grant a veto to their father, who had admitted paternity and had participated in the rearing of the children."

Applying pressure on one parent, to get the other parent to acquiesce to a course of action the other parent feels is likely to harm the children raises the kind of undue pressures that the court stated would "offend" due process. Ultimately, if harm to the children resulted, as both parents feel it would, it could result in prosecution of the other parent, not protected under the immunity for the consequences of its action afforded by the state court under *Stump v. Sparkman* 1978.SCT., 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331.

The United States Supreme Court in *Troxel*

stated, "The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court." The family is not made up of independent, unrelated individuals. Harm to one is harm, to a greater or lesser degree, to all. Thus, in the instant case, the order should be reversed and courts nationwide should be prohibited from using secondary harm to non-participating parents to avoid having to provide due process.

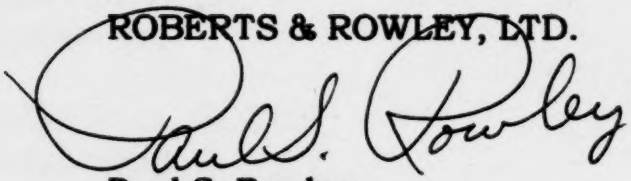
Conclusion of Arguments

The instant case results from the court imposing **"therapeutic intervention"** from a court ordered psychologist. This professional procedure was done over the objections of both fit parents, one subject to court orders, the other not part of the proceedings. It was done with no professional or non-professional advice concerning the procedure of any kind. It was not done to in any way to treat the children but merely to change their attitude towards their former grandparents. It was done despite court knowledge that the United States Supreme Court had already instructed that the **"plenary"** right to make such decisions rested with the parents in the instant circumstances, both parents not one manipulated by court order to coerce the other to go along. As well the court stated, in its opinion, that the parents and third parties were on equal footing when it came to such issues of

deciding on treatment and only the court could decide on treatment procedures and the provider of treatment, excluding the parents totally from the decision making process. The judicial system in the State of Arizona, all the way to the Arizona Supreme Court , has ruled that such invasions of parental rights of custody and control of their children are proper. There is no other location for judicial protection from this action other than the United States Supreme Court. Without the Supreme Court taking this case this precedent becomes law in Arizona an likely will be quoted as precedent in other states in other courts wishing to do similar things.

RESPECTFULLY SUBMITTED this 12th day of February, 2001.

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Appendix

1. Hendrix Order pp27
2. Opinion of AZ Court of Appeals pp32
3. Denial of Petition for Review by AZ Supreme Court 12/07/00 pp49
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Hendrix Order

In re the Matter of:
KATHRYN LUCILLE and
DONALD GRAVILLE,
Petitioners,
and
DOUGLAS PAUL DODGE
Respondent.

No. DR 97-90192
ORDER RE: CONTEMPT OF
VISITATION ORDER
(Assigned to the Hon.
Cheryl K. Hendrix)

The matter of Petitioners' Accelerated Petition re: Contempt of Visitation Order came on for hearing before this Court. The Respondent filed a Response. The parties appeared in person and by their counsel. Being fully advised in the premises.

THE COURT MAKES THE FOLLOWING FINDINGS:

1. The Petitioners'
(Grandparents) attempts to have and maintain a relationship with their grandchildren have been successfully thwarted by the Respondent He has been, at best, uncooperative in arranging for visitation. His attitude indicates he has been unreasonably vindictive and spiteful in effectively denying visitation.

2. Respondent's attempt to videotape the aborted visitation at the pizza parlor on April 7, 1998 was not £or the purposes of having a record of a joyful reunion between the children and their maternal grandparents

3. Respondent's position that the grandparents should have known his address and telephone number because the information was contained in exhibits that that were either offered or admitted in evidence at a court hearing is disingenuous. It unlikely that litigants themselves know what is contained in exhibits . There is no indication Respondent or his attorney made any effort to make sure the information was given to the Gravilles personally.

4. Respondent's conditions and restrictions placed on contact visitation wre not reasonable, i.e. (a) no gifts, (b) no other relatives being present; and (c) setting visitation times for Tuesday knowing the grandmother had to work late that day of the week.

5. If the grandparents are confrontational in their communication style with respondent during telephone calls it is probably due to their frustration in trying to re-establish their relationship with their grandchildren.

6. Respondent has acknowledged he has not encouraged his daughters to call their maternal grandparents,

7. Respondent decided that the grandparents would not see the girls any more and has furthered his decision by claiming that the girls did not want to see their grandparents. There is no indication the grandparents have done anything of a significant nature to cause alienation. There is every indication Respondent has caused the girls to be alienated from their maternal grandparents.

a. Respondent's conduct and attitude towards the Petitioners is based on his own personal agenda without regard to' the best interests of the children.

9. Respondent's conclusion that visiting with other relatives, along with the grandparents is "harmful" and "too stressful" on the children is baseless.

10. Respondent has not justified his conduct by stating the visitation order was invalid.

11. To the extent ~he order entered in January of 1998 is a valid, viable, and enforceable order, Respondent has willfully and contemptuously violated the order. Respondent is in contempt of court.

IT IS ORDERED THAT:

1. Pursuant to A.R.S. §25-410(B) Dr. Robert

A. Block, PhD. Is appointed to exercise continuing supervision over this case to assure that the visitation orders are complied with ant to provide therapeutic intervention so that a relationship between the children and grandparents can become a possibility, if not a reality. By this appointment the terms of the Maricopa County Superior Court Guidelines regarding Family Court Advisors are incorporated. Dr. Block is appointed for a term of 24 months subject to reappointment or earlier termination on the Court's own motion, request of Dr. Block or motion of either party. Respondent will pay 75% of costs, fees, and expenses charged by Dr. Block. Petitioners shall pay 25%.

2. To purge himself of contempt Respondent shall contact Dr. Block's office within 30 days after this order signed to schedule the first appointment[1] for the children to re-establish their relationship to the Petitioners. Dr. Block shall have sole discretion in determining the number of sessions necessary prior to the Petitioner having unsupervised time with the children. To purge himself of contempt the respondent must pay the required fees and expenses in a timely fashion, and cause the children to

[1]Respondent must notify Petitioners of the date and time of the first appointment within 24 hours after the appointment is made. Subsequent appointments shall be scheduled by Dr. Block & he shall communicate the dates and times to Respondent, Petitioners, and the [*hand written footnote not completed*]

be available at and to attend the sessions. To purge himself of the contempt the Respondent shall make the children available for visitation with the Petitioners twice each month, two days during winter recess from school, and on a three day weekend during the summer as ordered by Judge Keppel.

6. [points 3, 4, or 5 skipped in original order]Petitioners are awarded a judgment against Respondent fees in the amount of $2,610.00 plus costs of $61.00 with interest at 10% per annum from April 1, 1999 until paid in full.

7. Pending further orders of the appellate courts on issuance of a mandate, the order signed on January 6. 1998 (re-issued on January 28, 19998) is confirmed.

DONE IN OPEN COURT this 20th day of Sept,

Cheryl K. Hendrix

Hon. Cheryl K. Hendrix
Judge of the Superior Court

Original of the foregoing
lodged with the Clerk of the
Court and a copy mailed this
21st day of June, 1999, to:

Paul S. Rowley, Esq.
ROBERTS, ROWLEY & SMITH, LTD.
63 East Main St., Ste. 501
Mesa, AZ 85201-1114
Attorney for Respondent

Amanda Parsons

Graville v. Dodge III

Graville v. Dodge, No. 1 CA-CV 99-0582 (Ariz.App.Div.1 05/23/2000)

[1] IN THE COURT OF APPEALS STATE OF ARIZONA DIVISION ONE
[2] 1 CA-CV 99-0582
[3] 2000.AZ.0042103
[4] May 23, 2000
[5] KATHRYN LUCILLE AND DONALD GRAVILLE,
PETITIONERS- APPELLEES,
V.
DOUGLAS PAUL DODGE,
RESPONDENT- APPELLANT.
[6] Appeal from the Superior Court in Maricopa
County Cause No. DR 97-90192
The Honorable Cheryl K. Hendrix, Judge
[7] Stanley David Murray, P.C. Phoenix
By Stanley David Murray Attorneys
for Petitioners-Appellees
Roberts & Rowley, Ltd. Mesa
By Paul S. Rowley Attorneys for Respondent-Appellant
[8] The opinion of the court was delivered by: T I M M E R, Judge
[9] DEPARTMENT E
[10] OPINION
[11] AFFIRMED
[12] ¶1 Respondent-appellant Douglas

Paul Dodge ("Dodge") appeals from the trial court's Contempt of Visitation Order, which found that he had violated an order providing for visitation between petitioners-appellees Kathryn Lucille and Donald Graville (the "Gravilles") and their two granddaughters, Dodge's minor children. For the reasons discussed below, we affirm the trial court's order.

[13] FACTUAL AND PROCEDURAL BACKGROUND fn1

[14] ¶2 This appeal arises out of the Gravilles' attempt to obtain visitation with their two granddaughters under Arizona's Grandparents' Visitation Rights statute, Arizona Revised Statutes Annotated ("A.R.S.") section 25-409 (Supp. 1999).

[15] ¶3 In January 1998, the Honorable James H. Keppel entered an order (the "Keppel Order") awarding the Gravilles visitation rights with their granddaughters. This order required Dodge to allow the Gravilles visits with the children at least twice a month for four to eight hours at a time, and instructed both Dodge and the Gravilles to notify each other at least three days in advance of any change in address or telephone number. Dodge appealed the order, and this court affirmed the visitation and notification terms, but struck other provisions of the order. Graville v. Dodge, 195 Ariz. 119, 128, ¶¶ 39-42, 985 P.2d 604, 613 (App. 1999), review denied, Graville v. Dodge, No. CV-99- 00910PR (June 16, 1999)("Dodge I").

[16] ¶4 While the appeal in Dodge I was

pending, the Gravilles petitioned the trial court for an order finding Dodge in contempt of the Keppel Order. After a hearing, the Honorable Cheryl K. Hendrix found Dodge in contempt and entered an order to that effect (the "Hendrix Order").

[17] ¶5 Dodge challenged the Hendrix Order via both a special action and this direct appeal. In the special action, we accepted jurisdiction in part, and declined to grant the relief sought by Dodge therein. This appeal involves the provisions of the Hendrix Order appointing Robert A. Block, Ph.D., to supervise compliance with the visitation orders and provide therapeutic intervention. We have jurisdiction to consider this appeal pursuant to A.R.S. section 12-2101(C) (1994).

[18] Standard of Review

[19] ¶6 The trial court has broad discretion in issuing visitation orders, and we will not disturb such an order absent an abuse of that discretion fn2 Armer v. Armer, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970). Further, we will not set aside findings of fact unless clearly erroneous, and we give due regard to the opportunity of the trial court to judge the credibility of witnesses. See Ariz. R. Civ. P. 52(a); In re Marriage of Berger, 140 Ariz. 156, 161, 680 P.2d 1217, 1222 (App. 1983).

[20] Discussion

[21] ¶7 Dodge challenges the Hendrix Order on numerous grounds. We address each in turn.

[22] A. The Hendrix Order is not Vague and Ambiguous, and does not Place Dr. Block in an Ethical Dilemma.

[23] ¶8 Dodge asserts that Dr. Block's duties under the order are vague and ambiguous and, therefore, the order is unenforceable. The Hendrix Order provides, in pertinent part:

[24] Pursuant to A.R.S. § 25-410(B), Dr. Robert A. Block, Ph.D. is appointed to exercise continuing supervision over this case to assure that the visitation orders are complied with and to provide therapeutic [intervention] so that a relationship between the children and grandparents can become a possibility if not a reality. By this appointment the terms of the Maricopa County Superior Court Guidelines regarding Family Court Advisors are incorporated.

[25] We do not find this order indecipherable. The terms of visitation are clearly set forth in the Keppel Order and should be easily understood by Dr. Block so as to allow him to supervise compliance with the order. Moreover, it is evident from the court's findings that "therapeutic intervention" refers to employment of Dr. Block's skills to re-establish, if possible, the relationship between the Gravilles and their grandchildren fn3 Finally, although the Maricopa County Superior Court Guidelines regarding Family Court Advisors were not included in the record on appeal, we presume from their label that they provide additional guidance to Dr. Block.

[26] ¶9 Dodge further asserts that Dr.

Block's court-ordered duties present an ethical dilemma for him because they (i) require him to enforce the court's visitation order, even though it might vary from his professional judgment regarding the case; and (ii) force him to encourage the children's visits with the Gravilles over Dodge's objections and in violation of a psychologist's obligation to respect a parent's judgment regarding the treatment of a child. We do not interpret the Hendrix Order as requiring Dr. Block to "enforce" the visitation order, or to violate his ethical obligations. However, if the order places Dr. Block in a position where he may be forced to disregard any ethical or professional obligations, Dr. Block may raise these issues with the trial court. Thereafter, the trial court can terminate Dr. Block's appointment, fn4 and modify the visitation order, as appropriate. The possibility that Dr. Block may experience an ethical dilemma at a future date does not serve to invalidate the Hendrix Order.

[27] B. The Trial Court had Statutory Authority to Appoint Dr. Block.

[28] 1. Authority under A.R.S. section 25-410(B).

[29] ¶10 The trial court relied on A.R.S. section 25-410(B) (Supp. 1999) to appoint Dr. Block to supervise the parties' visitation. This provision states, in pertinent part:

[30] B. If either parent requests the order, or if all contestants agree to the order, or if the court finds that in the absence of the order the child's physical health would be endan-

gered or his emotional development significantly impaired, and if the court finds that the best interests of the child would be served, the court shall order a local social service agency to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out. A.R.S. § 25-410(B).

[31] ¶11 Dodge asserts that section 25-410(B) does not apply to this case because it addresses disputes between parents, not cases involving grandparents' visitation. Dodge argues that by invoking this statute to appoint Dr. Block, the trial court impermissibly gave statutory protections to the Gravilles that the legislature intended only to extend to parents. We disagree.

[32] ¶12 Section 25-410(B) does not state that supervised visitation may only be ordered in cases in which parents are opposing parties. Although this provision states that "either parent" may request such an order, it also provides that supervised visitation may be ordered if "all contestants" agree to the order, or if the trial court deems it necessary under specified conditions. Dodge argues that the lack of reference to grandparents in A.R.S. section 25-410(B) evidences the legislature's intent that supervised visitation cannot be ordered in cases in which grandparents are granted visitation under A.R.S. section 25-409. The Gravilles counter that the term "contestants," as used in section 25-410(B), includes grandparents, and supervised visitation can be ordered anytime a child's physical or emotional

health is endangered or impaired.

[33] ¶13 To determine legislative intent, we first review a statute's language. See Calmat of Arizona v. State ex rel. Miller, 176 Ariz. 190, 193, 859 P.2d 1323, 1326 (1993). Because A.R.S. section 25-410(B) does not expressly address grandparent visitation, we must look beyond the statutory language and consider the statute's effects and consequences, as well as its spirit and purpose. See id. We must also interpret section 25- 410(B) in light of A.R.S. section 25-409 (Supp. 1999). See Goulder v. Arizona Dep't of Transp., Motor Vehicle Div., 177 Ariz. 414, 416, 868 P.2d 997, 999 (App. 1993)("Statutes relating to the same subject matter should be read in pari materia to determine legislative intent and to maintain harmony."). The goal is to achieve consistency between the statutes. See id. at 416, 868 P.2d at 999.

[34] ¶14 The legislature has expressed its intention that grandparents be granted visitation rights under specified circumstances. See A.R.S. § 25-409. The clear intent of granting such rights was to serve the best interests of the child. See id. ("The superior court may grant the grandparents of the child reasonable visitation rights to the child during his minority on a finding that the visitation rights would be in the best interests of the child.")(emphasis added). In light of the grant of visitation rights to grandparents, it would be absurd to believe that the legislature intended to leave the trial court without the ability to implement the visitation order, if neces-

sary, through supervised visitation. See State v. Medrano-Barraza, 190 Ariz. 472, 474, 949 P.2d 561, 563 (App. 1997)("We presume the framers of the statute did not intend an absurd result and our construction must avoid such a consequence."); see also A.R.S. § 1-211(B) ("Statutes shall be liberally construed to effect their objects and to promote justice."). Phrased another way, having recognized that the best interests of a child may compel granting visitation rights to grandparents, the legislature surely did not intend to disregard those interests by failing to allow supervised visitation when the physical or emotional health of the child is at risk. See Forino v. Arizona Dep't of Transp., 191 Ariz. 77, 80, 952 P.2d 315, 318 (App. 1997)("To discern the legislature's intent, we may consider the effect and consequences of alternative construction."); see also Phoenix v. Superior Court, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984) (cardinal rule of statutory interpretation is to ascertain legislative intent, and court should interpret statute so as to give it a fair and sensible meaning). Additionally, and after our review of the legislative history of A.R.S. sections 25-409 and 25-410(B), we discern no reason why the legislature would allow the trial courts discretion to order supervision for parent visitation, but deny such relief for grandparent visitation. fn5 For these reasons, we hold that the legislature intended to allow the trial court to order supervised visitation under section 25- 410(B) in grandparent visitation cases.

[35] ¶15 Dodge next claims that even if section 25-410(B) applies to grandparent visitation, Judge Hendrix failed to comply with the statute because appointment of a therapist was not (i) sought by either parent; (ii) agreed upon by all the contestants; or (iii) found by the trial court as necessary for the children's physical or emotional health. See A.R.S. § 25-410(B). We reject Dodge's argument because the trial court ruled that Dr. Block's assistance was needed to ensure compliance with the visitation orders, given Dodge's history of obstructionism and contempt for the court's orders. This ruling constitutes a finding that the order was necessary for the children's emotional health. Therefore, the trial court made the threshold finding mandated by section 25-410(B).

[36] ¶16 Dodge additionally contends that Judge Hendrix could not order supervised visitation because her involvement in the case was limited to the contempt proceedings. During these proceedings, however, Judge Hendrix examined the Keppel Order, reviewed expert evidence indicating that visitation with the Gravilles is in the children's best interests, heard testimony and considered other evidence revealing Dodge's continual defiance of the Keppel Order. fn6 We find that Judge Hendrix had before her the information needed for her determination that Dr. Block's assistance in enforcing the visitation order was in the children's best interests. fn7

[37] 2. Authority under A.R.S. section

25-414(A).

[38] ¶17 Even if A.R.S. section 25-410(B) did not apply to support the Hendrix Order, the trial court had authority to appoint a counselor to supervise the parties' visitation pursuant to A.R.S. section 25-414(A) (Supp. 1999), the statute governing violation of visitation rights. Subsection (A)(4) of that statute specifically authorizes the court to order family counseling, while subsection (A)(7) allows the court to "[m]ake any other order that may promote the best interests of the child or children involved." A.R.S. § 25-414(A). Dodge asserts that we cannot rely on A.R.S. section 25-414(A) because Judge Hendrix cited A.R.S. section 25-410(B) as the basis for her appointment of Dr. Block. However, we can affirm the trial court's ruling if it was correct for any reason. See Hale v. Amphitheater School Dist. No. 10, 192 Ariz. 111, 114, ¶ 5, 961 P.2d 1059, 1062 (App. 1998).

[39] ¶18 Dodge next claims that A.R.S. section 25-414 applies only to disputes between parents and is inapplicable to grandparent visitation. We reject this argument for the same reasons we reject Dodge's argument regarding the scope of A.R.S. section 25-410(B).

[40] ¶19 Dodge further contends that Dr. Block's appointment is not equivalent to the "family counseling" allowed under A.R.S. section 25-414(A)(4). Dodge's main complaint appears to be that Dr. Block's appointment to supervise the parties "indefinitely" goes "far beyond" the appointment of a family counselor. The court did

not appoint Dr. Block for an indefinite (or infinite) time period. Rather, the order sets a presumptive two-year term for Dr. Block's appointment, which may be reduced or extended per further court order.

[41] ¶20 Dodge also complains that the "catch-all" provision in A.R.S. section 25-414(A)(7) should not apply to grandparents' visitation cases because it would authorize a vast array of orders, some of which will "undoubtedly" substantially interfere with parents' rights to decide issues regarding their children's welfare and upbringing. As discussed infra, Dodge has not demonstrated that the Hendrix Order substantially interferes with his parenting rights. To the extent that orders in other cases might do so, courts will have to address those issues on a case-by-case basis.

[42] C. The Hendrix Order is not an Unconstitutional Application of the Grandparents' Visitation Statute.

[43] ¶21 Dodge argues that appointment of Dr. Block to supervise and provide "therapeutic intervention" in the visits between the Gravilles and their grandchildren infringes upon his constitutional rights to custody and control of his children, as well as his children's constitutional rights to be free of "thought reform." As a result, he argues that the Hendrix Order represents an unconstitutional application of the Grandparents' Visitation Rights statute.

[44] ¶22 In Dodge I, this court concluded that the visitation provisions of the Keppel Order

did not constitute a substantial or unconstitutional interference with Dodge's parental rights. 195 Ariz. at 128, ¶ 39, 985 P.2d at 613. The Hendrix Order does not enlarge or significantly alter the visitation provisions we have already approved in the prior appeal. Rather, it merely provides a means by which the visitation may be more effectively carried out given the parties' history of discord. This order does not impermissibly infringe upon Dodge's parental rights. ¶23 Moreover, the order does not subject the children to any type of "thought control." It simply appoints a therapist to supervise and facilitate the visits to ensure the least amount of disturbance to the children.

[45] D. The Hendrix Order does not Impermissibly Expand on the Keppel Order, nor does it Delegate the Court's Discretion to Dr. Block.

[46] ¶24 Dodge contends that the Hendrix Order impermissibly expands on the Keppel Order by providing for unsupervised visitation after Dr. Block determines that supervised visitation is no longer necessary. Contrary to Dodge's assertion, however, the Hendrix Order did not contradict the Keppel Order. The latter order never barred unsupervised visitation. Rather, the only limitation regarding the mechanics of the visitation concerned the location of the visits. The Keppel Order provided that the first two months of visits should occur in a public place "to accommodate [Dodge's] concerns of sanitary conditions and secondary smoke; and to accom-

modate the children's possible discomfort of being in the same home where their Mother died." After this two-month adjustment period, the visits could be held at any location. Moreover, other provisions of the Keppel Order, such as the provision allowing the Gravilles a three-day weekend with the children during their summer vacation, indicate that unsupervised visitation was contemplated by Judge Keppel.

[47] ¶25 Relying upon DePasquale v. Superior Court, 181 Ariz. 333, 890 P.2d 628 (App. 1995), Dodge next argues that the Hendrix Order inappropriately vests authority in an expert to make decisions that should be reserved to the trial court. DePasquale is distinguishable from the case at issue, and we therefore reject Dodge's argument.

[48] ¶26 In DePasquale, this court held that the trial court erred by declaring that it would order whatever interim child custody a psychologist might recommend. 181 Ariz. at 335-336, 890 P.2d at 630-631. The DePasquale court concluded that while a court may consider expert opinion in making custody decisions, it "can neither delegate a judicial decision to an expert witness nor abdicate its responsibility to exercise independent judgment." Id. at 336, 890 P.2d at 631. Here, the trial court did not relinquish to Dr. Block its authority to determine visitation issues or the best interests of the children, thereby complying with DePasquale. In the first part of this case, Judge Keppel examined the evidence, including the family assessment evalua-

tion of Dr. Marlene Joy, and determined that visitation with the Gravilles was in the best interests of the children. Judge Keppel also established guidelines regarding the appropriate amount and timing of visitation. In the contempt proceedings, Judge Hendrix concluded that outside assistance was needed to effectuate that visitation. She did not improperly delegate the visitation decision, or consideration of the children's best interests, to Dr. Block. Thus, based on our narrow interpretation of the Hendrix Order, the trial court did not violate DePasquale as it neither delegated a judicial decision to Dr. Block, nor abdicated its responsibility to exercise independent judgment. See DePasquale, 181 Ariz. at 336, 890 P.2d at 631.

[49] E. Attorneys' Fees.

[50] ¶27 The Gravilles request an award of attorneys' fees and costs on appeal pursuant to A.R.S. sections 25-324 (Supp.1999) and 25-414(C). We decline to award fees pursuant to the latter provision as it concerns violation of a visitation order. Although this appeal stems from a contempt proceeding, the subject of the appeal is the modification of the terms of visitation. Therefore, section 25-414(c) does not authorize us to award attorneys' fees to the Gravilles.

[51] ¶28 However, A.R.S. section 25-324 authorizes us to order one party to pay the fees and expenses incurred by the other party in a domestic relations case after considering the parties' relative financial resources. See In re Marriage of Zale, 193 Ariz. 246, 251, 972 P.2d

230, 235 (1999). One purpose of the statute is to provide a remedy for the party least able to pay. See id. (citing Gore v. Gore, 169 Ariz. 593, 594, 821 P.2d. 254, 255 (App. 1991)). The Gravilles may submit a statement of fees and costs, along with a verified statement of their financial resources. See ARCAP 21(c)(2) (statement of amount claimed shall set forth any other factors "relevant to the determination of a reasonable fee"). We will determine whether to award attorneys' fees, and in what amount, upon our review of the Gravilles' statement and any objection filed by Dodge pursuant to Rule 21(a), Arizona Rules of Civil Appellate Procedure. Any objection filed by Dodge shall contain a verified statement of Dodge's financial resources.

[52] CONCLUSION

[53] ¶29 For the above-stated reasons, we affirm the Hendrix Order.

[54] ANN A. SCOTT TIMMER, Judge

[55] CONCURRING:

[56] PHILIP E. TOCI, Presiding Judge

[57] RUDOLPH J. GERBER, Judge

Opinion Footnotes

[58] fn1 Discussions of the early factual and procedural history of this case appear in both Graville v. Dodge, 195 Ariz. 119, 985 P.2d 604 (App. 1999), review denied, Graville v. Dodge, No. CV-99-00910PR (June 16, 1999)("Dodge I"), and Graville v. Dodge, 1 CA-SA 99-0235 (App. Nov. 26, 1999) (unpublished Memorandum Deci-

sion) ("Dodge II"). We include here only the facts that are essential to our determination of this appeal.

[59] fn2 In his reply brief, Dodge discusses a pending United States Supreme Court case (Troxel v. Granville, No. 99-138) disputing the constitutionality of Washington's grandparents' visitation statute. Dodge relies on the tenor of certain justices' questions during the oral argument in Troxel to urge us to apply a strict scrutiny analysis to the issues raised in this appeal. However, this appeal does not address the constitutionality of Arizona's Grandparents' Visitation Rights statute, A.R.S. § 25-409. We addressed that issue in Dodge I, where we chose to apply a rational basis standard of review, not a strict scrutiny one, in determining that the statute is constitutional. See Dodge I, 195 Ariz. at 125-26, ¶¶ 24 and 27, 985 P.2d at 610-11. Here, our review is limited to determining whether the trial court abused its discretion by modifying the visitation order through the appointment of a supervising psychologist.

[60] fn3 The trial court found that the Gravilles' "attempts to have and maintain a relationship with their grandchildren have been successfully thwarted by [Dodge]. He has been, at best, uncooperative in arranging for visitation. His attitude indicates he has been unreasonably vindictive and spiteful in effectively denying visitation."

[61] fn4 The Hendrix Order provides that Dr. Block's appointment may be terminated on

motion by the court or the parties, or by Dr. Block's request.

[62] fn5 The weakness of Dodge's interpretation of A.R.S. § 25- 410(B) is further revealed by his contention that parents can seek supervised visitation in grandparent visitation cases, but grandparents are prevented from seeking such assistance from the court. The best interests of the child are not well-served by an interpretation of § 25-410 that conditions assistance for visitation upon the identity of the party making the request for help.

[63] fn6 Dodge argues that Judge Hendrix was required to interview his children before entering her order. We disagree. See A.R.S. § 25-405(A)(Supp. 1999) ("The court may interview the child in chambers to ascertain the child's wishes . . . as to visitation.") (emphasis added).

[64] fn7 Dodge makes a passing reference to the fact that A.R.S. § 25-410(B) authorizes the court to order a "local social service agency" to supervise visitation. To the extent Dodge attempts to argue that Dr. Block does not fall within this definition and, therefore, the court lacked authority to appoint him, he failed to develop this argument on appeal. Therefore, we do not address it. See Ariz. R. Civ. App. P. ("ARCAP") 13(a)(6); Adams v. Valley National Bank, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984) (court will not address issue party failed to develop on appeal).

Supreme Court
State of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3291

Noel K. Dessaint
Kathleen E. Kemply
Clerk of the Court
Chief Deputy Clerk

December 7, 2000

RE: KATHRYN GRAVILLE et. vir v. DOUGLAS P DODGE
Arizona Supreme Court No. CV-00-0225-PR
Court of Appeals Division One No. 1-CA-CV 99-0582
Maricopa County Superior Court No. DR 97-90192

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on Decembe 05, 2000, in regard to the above-referenced cause:

ORDERED: Petion for Review – Denied
Record returned to the Court of Appeals, Division One, Phoenix, this 7th day of December, 2000.

Noel K Dessaint, Clerk

TO:
Paul S Rowley, Esq., Roberts and Rowley & Smith LTD
Stanley D Murray, Esq.
Glen D Clark, Clerk, Court of Appeals, Division One
West Publishing Company
Lexus-Nexus
dk

Deposition of Lucille Graville, 4/21/97

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KATHRYN LUCILLE GRAVILLE,

Petitioner,

vs. No. DR 97-90192

DOUGLAS PAUL DODGE,

Respondent.

DEPOSITION OF KATHRYN LUCILLE GRAVILLE

Mesa, Arizona
April 21, 1997
11:05 o'clock a.m.

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.
.

starting page 135

Q Was he a good father?

A What time he was around the children, he was okay with them.

Q When you saw Doug interact with the children, was he appropriate with them?

A Yes.

Q Did they bond and relate to him?

A Well, he -- about the time that they would be able to bond with him, he'd have to leave again. He would only be home for maybe like three weeks or a 30-day leave or a three-week leave and then he would be off again.

25 Q I understand that.

Page 136

1 A Okay.

2 Q Would he play with the kids?

3 A Would he play with them?

4 Q Yes.

5 A Well, yes, he played with them.

6 Q Would the kids go up to him and hug him

7 without any prompting on his behalf?

8 A Well, yes, they always was glad to see him

9 whenever he get home.

10 Q They knew their father?

11 A Yes.

12 Q They enjoyed being with him?

13 A Yes.

14 Q And Doug was appropriate in his parenting

with the children?

A When he was around.

Q Yeah, I'm talking about what you observed.

A Yeah.

Q Not what you heard or anything, just what

you saw.

A Yes.

MR. KANE: Excuse me, let me impose an objection

here, Counsel. We're not contesting custody, this is not

a custody case. This is a grandparents' rights

visitation issue. We're not claiming the father

shouldn't have custody. We stipulate that he has custody

and should continue to have custody.

MR. ROWLEY: Are you through?

MR. KANE: Yes.

Q BY MR. ROWLEY: So during the time that Doug and Gayla were married you liked your son-in-law and thought he was an appropriate parent for your grandchildren?

A Yes.

Q After they got divorced, same feelings, still thought he was an okay father?

A Yes, he was okay.

Testimony from trial 9/11/98

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 IN AND FOR THE COUNTY OF MARICOPA
3
4 KATHRYN LUCILLE GRAVILLE
5 Petitioner,
6 and) NO. DR 97-90192

7 DOUGLAS PAUL DODGE,
8 Respondent.
9
10 REPORTER'S TRANSCRIPT OF PROCEEDINGS
11 Continuation of Order to Show Cause
12
13 BEFORE: THE HONORABLE CHERYL K. HENDRIX, Judge
14 APPEARANCES: Mr. Stanley D. Murray
15 Attorney at Law Representing the Petitioner
16 Mr. Paul S. Rowley
17 Attorney at Law Representing the Respondent
18
19
20 Mesa, Arizona September 11, 1998
21

[starting page 26, direct examination of the Father, Douglas Paul Dodge]
20 Q And in the adoption proceedings were the
21 children's names changed?
22 A Yes, they were.
23 Q What are the children's names now?
24 A Amanda Dodge and Victoria Dodge.
25 Q Has Donald or Lucille ever called them by their

27
1 legal names that are now their legal names?
2 A They've never called Amanda by her new legal name,
3 and they don't call Victoria by her new nickname Vicky.
4 They'll call her Victoria.
5 Q Have you asked them to call them by their names?
6 A Yes, I have.
7 Q Have the children asked to be called by their
8 names?
9 A Yes. The children have too.

(2)

Supreme Court, U.S.
FILED
MAY 23 2001
CLERK

No. 00-1300

In The

Supreme Court of the United States

DOUGLAS PAUL DODGE,

Petitioner,

v.

KATHRYN LUCILLE AND DONALD GRAVILLE,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Arizona, Division One

BRIEF IN OPPOSITION

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JURISDICTION

Question 2 is out of time.

Petitioner's application for a writ of certiorari as to Question 2 is out of time. Question 2 was presented in *Graville v. Dodge*, 195 Ariz. 119, 123, ¶ 15, 985 P.2d 604, 608 (App. 1999) (*"Dodge I"*), and was decided adversely to petitioner on January 28, 1999. The Arizona Supreme Court denied review on September 21, 1999. No petition for certiorari was filed seeking review of *Dodge I*.

Likewise, Question 2 was not raised or addressed in *Graville v. Dodge*, 197 Ariz. 591, 5 P.3d 925 (App. 2000) (*"Dodge III"*):

> [T]his appeal does not address the constitutionality of Arizona's Grandparents' Visitation Rights statute, A.R.S. § 25-409. We addressed that issue in *Dodge I*. . . . Here, our review is limited to determining whether the trial court abused its discretion by modifying the visitation order through the appointment of a supervising psychologist.

197 Ariz. at 600, 5 P.3d at 934 n.2.

Therefore, the petition for writ of certiorari to review Question 2, filed more than sixteen months after the Arizona Supreme Court denied review of *Dodge I*, is untimely. 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.

Question 3 was not preserved below.

Question 3 is not properly before this Court because it was not raised or involved in *Dodge III* or presented in the petition to the Arizona Supreme Court for review of

that opinion (*see* issues presented on petition for review appended hereto). *E.g., Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

STATEMENT OF THE CASE

Respondents hereby incorporate the facts recited in the opinions below (*Dodge I, II and III*).

REASONS WHY THE PETITION SHOULD BE DENIED

1. An order for supervised visitation does not unconstitutionally infringe a parent's right of custody and control.

Petitioner misapprehends the Hendrix Order. Nowhere does it order Dr. Block "to intervene in the relationship of a parent and child in order to alter the child's attitude concerning [their grandparents]," as petitioner argues. Instead, finding that "[respondents'] attempts to have and maintain a relationship with their grandchildren have been successfully thwarted by the [petitioner]," the Hendrix Order merely appointed Dr. Block, as authorized by A.R.S. § 25-410(b):

> to exercise continuing supervision over this case to assure that the visitation orders are complied with and to provide therapeutic intervention so that a relationship between the children and grandparents can become a possibility, if not a reality.

Hendrix Order, ¶ 1.

Rejecting petitioner's interpretation of the Hendrix Order and his argument of unconstitutionality based on that misinterpretation, the Arizona Court of Appeals explained that the order "simply appoints a therapist to supervise and facilitate the visits to ensure the least amount of disturbance to the children." 197 Ariz. at 598, ¶ 23, 5 P.3d at 932. In other words, a proper reading of the order defeats any argument of unconstitutionality.

Parham v. J.R., 442 U.S. 584 (1979), the only authority cited by petitioner, is inapposite. *Parham* involved the constitutionality of procedures for admitting a minor child to a state mental health care facility, not the impact of supervised visitation on a parent's rights. Neither is any language from *Parham* supportive of petitioner's argument. In fact, petitioner's purported quote from Parham is incomplete, inaccurate, out of context, and a blending of passages from pages 601-602 and 604 of the opinion. An accurate quotation of those passages reveals their irrelevance to this case:

> We next deal with the interests of the parents who have decided, on the basis of their observations and independent professional recommendations, that their child needs institutional care. Appellees argue that the constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents' traditional interest in and responsibility for the upbringing of their child must be subordinated at least to the extent of providing a formal adversary hearing prior to a voluntary commitment.

442 U.S. at 601-602.

> In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply. We also conclude, however, that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment.

442 U.S. at 604.

Finally, to the extent that the Hendrix Order affected petitioner's custody and control of his children, it was justified and is not unconstitutional because the presumption that petitioner, as a fit parent, was acting in the best interests of his children had been burst. Indeed, the Hendrix Order found that petitioner's "conduct and attitude towards the [respondent grandparents] is based on his own personal agenda without regard to the best interest of the children." Hendrix Order, finding 7(a).

2. Arizona's grandparents' visitation statute is unlike the statute in *Troxel*, and is constitutional.

After this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), the Arizona Court of Appeals re-examined the constitutionality of Arizona's grandparents' visitation

statute and reaffirmed its earlier holding in *Dodge I* that A.R.S. § 25-409 is constitutional. *Jackson v. Tangreen*, No. 1 CA-CV 99-0542, 2000 WL 1873228 (Ariz. App., filed Dec. 26, 2000). If this Court elects to consider the constitutionality of Arizona's grandparents' visitation statute, although not timely presented, respondents adopt the reasoning of *Jackson v. Tangreen*:

> Two factors support our conclusion that the Supreme Court's holding in *Troxel* has no impact on A.R.S. section 25-409. First, although the Court found the Washington statute's language too broad to pass constitutional muster, it refused to find nonparental visitation statutes unconstitutional per se. *Id.* [530 U.S. at 73.]
>
> Second, A.R.S. section 25-409 is much more narrowly drawn than the Washington statute in *Troxel*. In contrast to the Washington law, Arizona's nonparental visitation statute is limited to grandparents and great-grandparents. A.R.S. § 25-409(A), (B). In addition, the court may order visitation over parental objections only if the marriage of the parents has been dissolved for at least three months, one of the parents of the child is deceased or missing, or the child was born out of wedlock. *Id.* at (A)(1)-(3). Further, the statute requires the court to evaluate "all relevant factors" as well as five specific factors to determine if visitation serves the best interests of the child. *Id.* at (C)(1)-(5). Thus, A.R.S. section 25-409 stands in stark contrast to the "breathtakingly broad" Washington statute. *Troxel*, 530 U.S. at ___, 120 S.Ct. at 2061.

* * *

We believe Arizona's statute does not exceed the "bounds of the Due Process Clause." Section 25-409 requires Arizona courts to give weight to the parent's visitation decisions. For example, the court must assess "[t]he motivation of the person denying visitation." A.R.S. § 25-409(C)(3). It must also consider "[t]he motivation of the requesting party" and "[t]he historical relationship, if any, between the child and the person seeking visitation." *Id.* at (C)(1), (2). Also, the court must assess the amount of visitation requested and determine the impact that the visitation will have on the child's customary activities. *Id.* at (C)(4). As we concluded in *Graville*, these procedural safeguards "show[ ] that the legislature was conscious of parents' superior right to the custody and care of their children." 195 Ariz. at 127, 985 P.2d at 612 (quoting *West v. West*, 294 Ill.App.3d 356, 228 Ill.Dec. 794, 689 N.E.2d 1215, 1221 (Ill.App.Ct.1998)). Moreover, as subsections (C)(1) through (C)(4) suggest, our statute applies only in cases in which a parent has denied visitation, not merely limited it. Thus, by applying the statute as written, Arizona courts do not violate the Due Process Clause.

Because *Troxel* does not stand for the proposition that nonparental visitation statutes are per se unconstitutional, and because A.R.S. section 25-409 satisfies the due process concerns identified in *Troxel*, we reaffirm our holding in *Graville* that A.R.S. section 25-409 is constitutional.

3. The rights of the children's stepmother are not at issue in this action to enforce the visitation order against petitioner.

A review of the factual and procedural history of the parties' litigation betrays petitioner's argument regarding the rights of the children's adoptive mother as the false issue it is. Because petitioner was ordered to allow respondents visitation with the children before their stepmother adopted them, that order was unaffected by the adoption, and all proceedings and appeals subsequent to that order have concerned only its enforcement as to petitioner; those proceedings and appeals have properly never involved the adoptive mother.

At the time of trial on respondents' petition seeking visitation with their grandchildren, the children's stepmother had not yet adopted them. 195 Ariz. at 122, 985 P.2d at 607 n.1. "In April 1998, while the appeal in *Dodge I* was pending, . . . the children were legally adopted by their stepmother." *Dodge v. Superior Court (Graville)*, No. 1 CA-SA 99-0235 (Ariz. App., filed Nov. 26, 1999) ("*Dodge II*"). Respondents' visitation rights did not terminate upon adoption of the children by their stepmother. A.R.S. § 25-409(F).

In *Dodge I*, petitioner challenged the constitutionality of Arizona's grandparents' visitation statute and the amount of visitation awarded to respondents. However, he did not argue that the statute violated the rights of the adoptive mother.

While *Dodge I* was pending, respondents petitioned the trial court for an order finding petitioner in contempt for violating the Keppel Order awarding the respondents

visitation rights. After being found in contempt by the Hendrix Order, petitioner challenged that finding by a special action in which he argued, *inter alia*, that respondents' "visitation rights were terminated by operation of law when the children were adopted by their stepmother." *Dodge II*. However, he made no argument putting the rights of the children's adoptive mother at issue in the special action. *See Dodge II*.

Finally, petitioner's direct appeal from the Hendrix Order only challenged its provisions regarding continuing supervision of the Keppel Order. That appeal, and the resulting opinion (*Dodge III*) which is now before this Court, did not involve the rights of the adoptive mother.

CONCLUSION

For these reasons, the respondents Kathryn Lucille and Donald Graville respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Arizona Court of Appeals filed in this case on May 23, 2000, review of which was denied by the Arizona Supreme Court on December 5, 2000.

Respectfully submitted,

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ARIZONA REVISED STATUTES

§ 25-409. Visitation rights of grandparents and great-grandparents

A. The superior court may grant the grandparents of the child reasonable visitation rights to the child during his minority on a finding that the visitation rights would be in the best interests of the child and any of the following are true:

1. The marriage of the parents of the child has been dissolved for at least three months.

2. A parent of the child has been deceased or has been missing for at least three months. For the purposes of this paragraph, a parent is considered to be missing if the parent's location has not been determined and the parent has been reported as missing to a law enforcement agency.

3. The child was born out of wedlock.

B. The superior court may grant the great-grandparents of the child reasonable visitation rights on a finding that the great-grandparents would be entitled to such rights under subsection A if the great-grandparents were grandparents of the child.

C. In determining the child's best interests the court shall consider all relevant factors, including:

1. The historical relationship, if any, between the child and the person seeking visitation.

2. The motivation of the requesting party in seeking visitation.

3. The motivation of the person denying visitation.

4. The quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities.

5. If one or both of the child's parents are dead, the benefit in maintaining an extended family relationship.

D. If logistically possible and appropriate the court shall order visitation by a grandparent or great-grandparent to occur when the child is residing or spending time with the parent through whom the grandparent or great-grandparent claims a right of access to the child. If a parent is unable to have the child reside or spend time with that parent, the court shall order visitation by a grandparent or great-grandparent to occur when that parent would have had that opportunity.

E. A grandparent or great-grandparent seeking to obtain visitation rights under this section shall petition for these rights in the same action in which the parents had their marriage dissolved or by a separate action in the county where the child resides if no action for dissolution has been filed or the court entering the decree of dissolution no longer has jurisdiction.

F. All visitation rights granted under this section automatically terminate if the child has been adopted or placed for adoption. If the child is removed from an adoptive placement, the court may reinstate the visitation rights. This subsection does not apply to the adoption of

the child by the spouse of a natural parent if the natural parent remarries.

---

§ 25-410. Judicial supervision

A. Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health, care and religious training, unless, upon motion by the noncustodial parent, the court, after hearing, finds that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.

B. If either parent requests the order, or if all contestants agree to the order, or if the court finds that in the absence of the order the child's physical health would be endangered or his emotional development significantly impaired, and if the court finds that the best interests of the child would be served, the court shall order a local social service agency to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out. At the discretion of the court, reasonable fees for the supervision may be charged to one or both parents, provided that the fees have been approved by the supreme court.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DOUGLAS PAUL DODGE, Petitioner, v. THE HONORABLE CHERYL K. HENDRIX, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, DON and LUCILLE GRAVILLE, Real Parties in Interest.	1 CA-SA 99-0235 DEPARTMENT E MEMORANDUM DECISION (Not for Publication – Rule 7(i), Arizona Rules of Procedure for Special Actions; Rule 28, Arizona Rules of Civil Appellate Procedure) (Filed Nov. 26, 1999)

Appeal from the Superior Court of Maricopa County

Cause No. DR 97-90192

The Honorable Cheryl K. Hendrix, Judge

JURISDICTION ACCEPTED IN PART, DECLINED IN PART; RELIEF DENIED

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RYAN, Judge

¶ 1 In this special action, Douglas Paul Dodge challenges the trial court's order (the "Hendrix Order") finding him in contempt of court and sanctioning him for his wilful violation of a prior order (the "Keppel Order") granting visitation rights to Don and Lucille Graville with their granddaughters, Dodge's minor children. For the reasons set forth below, we accept special action jurisdiction in part and decline it in part. We deny relief, but modify the court's sanction.

Factual and Procedural Background

¶ 2 A discussion of the early factual and procedural history of this case appears in *Graville v. Dodge*, 287 Ariz. Adv. Rep. 68 (App. 1999), *review denied, Graville v. Dodge*, No. CV-99-0091-PR (June 16, 1999) (*Dodge I*). We include here only the facts that are essential to our determination of this special action.

¶ 3 In January 1998, the Keppel Order awarded the Gravilles visitation rights with their granddaughters, Dodge's minor children. This order placed various requirements on the parties, including that Dodge allow the Gravilles to visit with the children at least twice a month for four to eight hours at a time and that both Dodge and the Gravilles notify each other at least three days before changing their addresses or telephone numbers. Dodge appealed the Keppel Order, and we affirmed it with modifications concluding that the court could not require Dodge to: (1) encourage the children to call the Gravilles on a weekly basis; (2) consider the Gravilles as alternate care-givers; or (3) refrain from discussing custody issues with the children. *See Dodge I*, 287

Ariz. Adv. Rep. at 74, ¶ 59. We affirmed the visitation and notification terms. *See id.*

¶ 4 In April 1998, while the appeal in *Dodge I* was pending, the Gravilles petitioned the trial court for an order finding Dodge in contempt for violating the Keppel Order. That same month, the children were legally adopted by their stepmother.

¶ 5 After a hearing, the court found Dodge in contempt and entered the Hendrix Order. This order included several findings of fact on which the trial court based the order, but only three are relevant to this special action: (1) Dodge thwarted the Gravilles' visitation attempts, (2) Dodge failed to notify the Gravilles of his changed address and telephone number, and (3) Dodge did not encourage the children to telephone the Gravilles.

¶ 6 Dodge asked the court to reconsider its contempt finding. Although the motion for reconsideration is not in this record, it appears from the court's minute entry that Dodge complained that the Keppel Order was vague and that its term ordering him to encourage telephone contact had been held unconstitutional on appeal. The trial court explained that Dodge was not in contempt for failing to encourage the children to call the Gravilles, but rather for not allowing the Gravilles to visit with the children. After Dodge filed a motion for clarification and asked the court to reopen the matter, the court specifically said that Dodge was in contempt for failing to allow the Gravilles to visit with the children twice each month for four to eight hours at a time.

¶ 7 In the Hendrix Order, the trial court included some terms as the means for Dodge to purge his contempt, and

some terms that did not mention his contempt at all. The court appointed a supervisor to ensure that the visitation orders were carried out and to provide counseling to help re-establish the relationship between the children and the Gravilles, and divided the cost of the supervised visits and counseling between the parties, with Dodge to pay seventy-five percent and the Gravilles twenty-five percent. These terms did not mention Dodge's contempt. On the other hand, to purge his contempt the court ordered Dodge to schedule the first supervised visit within thirty days of the order, notify the Gravilles of it, make sure the children attended, and pay his part of the costs in a timely manner. In addition, the court restated part of the Keppel Order as a condition for Dodge to purge his contempt - Dodge had to allow the Gravilles access to the children twice each month for four to eight hours each time, for two days during the winter recess, and on a three-day weekend during the summer. Finally, the Hendrix Order awarded the Gravilles their attorneys' fees.

¶ 8 Dodge challenges the entire Hendrix Order in this special action. However, he has also appealed two parts of the Hendrix Order that he claims modify the earlier Keppel Order: (1) the appointment of Dr. Robert Block, Ph.D., to supervise the visitation and provide therapeutic intervention with the parties to divide the costs, and (2) the requirements surrounding how Dodge must schedule appointments with Dr. Bock and communicate the schedule to the Gravilles.

Discussion

I. *The Contempt Finding*

¶ 9 Judge Hendrix found Dodge is contempt of court for violating the Keppel Order. In Arizona, "orders adjudicating whether a person should be held in contempt for refusing to obey a court order are not appealable." *Elia v. Pifer*, 277 Ariz. Adv. Rep. 8, 14, ¶ 30, 977 P.2d 796, 802, ¶ 30 (App. 1998). As a result, Dodge has no equally adequate remedy by direct appeal of the contempt finding and we accept special action jurisdiction over his challenge to that part of the Hendrix Order. *See* Ariz. R.P. Special Actions 1(a); *Elia*, 277 Ariz. Adv. Rep. at 14, ¶ 30, 977 P.2d at 802, ¶ 30.

¶ 10 Dodge first argues that the Hendrix Order is unconstitutional because it is based in part on Dodge's failure to encourage the children to telephone the Gravilles. Because we held this term unconstitutional, Dodge argues that the entire Hendrix Order is tainted and must be quashed. However, a trial court's order is not invalid merely because it partially rests on findings that cannot by themselves support the ultimate judgment. *See Minderman v. Perry*, 103 Ariz. 91, 93, 437 P.2d 407, 409 (1968). "We will affirm the trial court's judgment if the result was legally correct for any reason." *Hale v. Amphitheater Sch. Dist. No. 10*, 192 Ariz. 111, 114, ¶ 5, 961 P.2d 1059, 1062, ¶ 5 (App. 1998) (quoting *General Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992); *Minderman*, 103 Ariz. at 93, 437 P.2d at 409.

¶ 11 Here, the trial court had a valid basis for finding Dodge in contempt. Although parts of the Keppel Order were invalidated on appeal, the trial court held Dodge in

contempt for violating parts that were valid. The court clarified the Hendrix Order in two minute entries, explaining that Dodge was not in contempt for violating anything that had been stricken from the Keppel Order. Instead, Dodge was in contempt because "[h]e did not allow the maternal grandparents to have access to their grandchildren at least twice a month for four to eight hours each time." This part of the Keppel Order was affirmed on appeal. Because the trial court found Dodge in contempt for violating this part of the Keppel Order and the evidence supports that finding, we deny relief from the contempt finding on this ground.

¶ 12 Dodge also argues that the trial court lacked jurisdiction to issue the Hendrix Order because Dodge's appeal from the Keppel Order was pending at the time. Dodge claims that the trial court's jurisdiction extended only to orders in direct furtherance of the pending appeal. Although Dodge's argument is unclear, he apparently believes that his pending appeal alone was enough to render the trial court powerless to enforce the Keppel Order. We disagree.

¶ 13 Judgments in cases involving the custody of children cannot be stayed on appeal except by an order of the appellate court. *See* Ariz. R. Civ. App. P. 7(a)(1) (stating that automatic stays granted on the filing of a supersedeas bond do not apply to child custody cases); Ariz. R. Civ. App. P. 7(c) (stating that Rule 7 does not limit the power of the appellate courts to stay proceedings during the pendency of appeal). Arizona courts view visitation as "a limited form of custody or a limitation upon the custody rights of another." *Finck v. O'Toole*, 179 Ariz. 404, 406, 880 P.2d 624, 626 (1994) (quoting *Bryan v. Bryan*, 132

Ariz. 353, 355, 645 P.2d 1267, 1269 (App. 1982)). Therefore, visitation orders are not stayed on appeal except by order of the appellate court. Although Dodge requested a stay from this court while he appealed the Keppel Order, his request was denied. The Keppel Order remained valid and enforceable during the pendency of the appeal.

¶ 14 Alternatively, Dodge argues that the trial court had no jurisdiction to find him in contempt because the Gravilles's visitation rights were terminated by operation of law when the children were adopted by their stepmother. The Keppel Order granted visitation rights to the Gravilles under Arizona Revised Statutes Annotated ("A.R.S.") section 25-409, which permits the court to award grandparents' visitation rights when it would be in the best interests of the child and a parent of the child is deceased. *See* A.R.S. § 25-409(A)(2). Although grandparents' visitation rights are not permanent and "automatically terminate if the child has been adopted or placed for adoption," automatic termination "does not apply to the adoption of the child by the spouse of a natural parent if the natural parent remarries." *Id.* § 25-409(F). Dodge remarried, and his spouse adopted the children. Under the statute's plain language, the Gravilles' visitation rights did not terminate when the children were adopted by their stepmother.

¶ 15 Dodge relies on prior decisions of this court that held that A.R.S. section 25-409(F), or its predecessor A.R.S. section 25-337.01, terminated grandparental visitation rights on the adoption of the grandchild. However, these cases either were overruled by an amendment to the statute or are distinguishable. For example, in *In re Marriage of Herreras*, this court found that the version of

A.R.S. section 25-409 in effect at the time terminated a grandmother's court-ordered visitation rights when the grandchild subsequently was adopted by the stepmother. *See* 159 Ariz. 511, 512, 768 P.2d 673, 674 (App. 1989). But the statute was amended in 1992, and its current version protects grandparents from the automatic loss of court-ordered visitation rights if the child is adopted by a stepparent. *Compare* A.R.S. § 25-337.01 (1988) *with* A.R.S. § 25-409(F); *see also* A.R.S. § 25-409(F) (historical and statutory notes). Therefore, our holding in *Marriage of Herreras* that adoption by a stepmother terminates grandparental visitation rights no longer controls.

¶ 16 Another example is *In re Appeal In Maricopa County Juvenile Action No. JA-502394*, 186 Ariz. 597, 925 P.2d 738 (App. 1996). That case dealt with a natural grandmother's visitation rights after her grandchild had been adopted by the natural grandfather and stepgrandmother. *See id.* at 598, 925 P.2d at 739. After the adoption, the natural grandmother petitioned for visitation rights but the trial court dismissed her petition because she had no legal basis on which to claim visitation rights. *See id.*

¶ 17 On appeal, we affirmed the dismissal. *See id.* The natural grandmother had petitioned for visitation under a part of A.R.S. section 25-337.01 that required the child to be born out of wedlock. *See id.* at 598-99, 925 P.2d 739-40. However, under a separate statute, the intervening adoption gave the child the same legal status as if she had been a natural child of the grandfather and stepgrandmother. *See id.* at 599, 925 P.2d at 740. Because the child no longer was legally born out of wedlock, any visitation rights the natural grandmother might have

asserted were superseded by the child's post-adoption legal status. *See id.*

¶ 18 We addressed a similar situation in *Guethe v. Truscott*, 185 Ariz. 29,912 P.2d 33 (App. 1995). There, after the child's parents divorced, the natural father voluntarily relinquished his parental rights. *See id.* at 30, 912 P.2d at 34. The natural mother remarried, and the child was adopted by the stepfather. *See id.* Two years later, the child's natural paternal grandmother petitioned for visitation rights which the trial court granted. *See id.*

¶ 19 The court reversed the trial court's visitation order. *See id.* Relying on the last sentence of A.R.S. section 25-337.01(D), now A.R.S. section 25-409(F), we found that the child's adoption by the stepfather prevented the trial court from subsequently awarding visitation rights to the grandparent. *See id.* In such a case, Arizona statutory law left the question of grandparental visitation solely within the discretion of the parents. *See id.; see also Maricopa County Juvenile Action No. JA-502394*, 186 Ariz. at 599, 925 P.2d at 740.

¶ 20 In both *Maricopa County Juvenile Action JA-502394* and *Guethe*, we held that the grandparent had no legal visitation rights with the grandchild. But, in each case, the grandparent was seeking visitation rights *after* the child had been adopted. Such is not the case here. The Keppel Order awarded visitation rights to the Gravilles *before* the children's stepmother adopted them and so the last sentence of A.R.S. section 25-409(F) applies. The Gravilles did not lose their court-ordered visitation rights because of the subsequent adoption nor did the trial court lose its jurisdiction to enforce them.

¶ 21 Dodge thus violated a valid and enforceable court order. The court was not divested of jurisdiction to enforce that order by the pending appeal, nor did the adoption of the children by their stepmother terminate the Gravilles's court-ordered visitation rights. Therefore, we deny relief from the court's finding that Dodge was in contempt.

II. *The Contempt Penalty*

¶ 22 Contempt is either criminal or civil, direct or indirect, depending on the circumstances. *See Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 416, 422 (1966).

> "[C]riminal contempt is the commission of a disrespectful act directed at the court itself which obstructs justice; civil contempt is the disobeyance of a court order directing an act for the benefit or advantage of the opposing party to the litigation; direct contempt is an act committed in the presence of the court or so near thereto as to obstruct the administration of justice; and constructive or indirect contempt is an act committed outside the presence of the court."

Id. (citations omitted). Although the Hendrix Order does not characterize Dodge's contempt as either civil or criminal, direct or indirect, Dodge committed indirect civil contempt. He wilfully disobeyed the court's valid order directing him to perform certain acts for the Gravilles's benefit and in the children's best interests.

¶ 23 The nature of the contempt determines the purpose of the sanction. In civil contempt, the sanction "is usually

considered to be remedial . . . [and it] is designed to enforce compliance with a court order. For that reason, civil contempt punishment is conditional and must be lifted if the contemnor obeys the order of the court." *Johnson v. Johnson*, 304 Ariz. Adv. Rep. 25, 26, ¶ 13 n.2 (App. 1999) (quoting *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980)).

¶ 24 In challenging his contempt sanction, Dodge first claims that the trial court exceeded its authority by ordering continuing supervision of the Keppel Order, counseling for the parties, and dividing the costs of the supervision and counseling between them. We conclude that this part of the Hendrix Order was not a sanction for Dodge's contempt, but a modification of the Keppel Order. Supervision and counseling may assist Dodge in complying with the Keppel Order in the future, but they have no coercive effect to compel his compliance. Although the trial court may have been motivated to order supervision and counseling because of Dodge's contempt, the court included no language in this part of the order indicating that it was a sanction for contempt. Because we view this term as modifying the Keppel Order, the proper avenue for review of this decision is by direct appeal, which is pending, and we decline further review of this part of the Hendrix Order in this special action.

¶ 25 Dodge also objects to terms that the trial court imposed as contempt sanctions. For example, the trial court ordered Dodge to contact the visitation supervisor within thirty days to schedule the first appointment, and to communicate the date and time to the Graville's within twenty-four hours thereafter. The supervisor would

schedule subsequent visits and communicate them to the Gravilles, but Dodge had to make the children available for the scheduled visits and pay his part of the costs in a timely fashion. The court also recast the total visitation required by the Keppel Order as a means for Dodge to purge his contempt.

¶ 26 The scheduling and payment requirement is ongoing, and the Hendrix Order does not provide for it to end if Dodge complies with the terms of the Keppel Order. Similarly, the amount of visitation that Dodge must allow is described in periodic, ongoing terms, and there is no provision that it ends upon compliance with the Keppel Order. As such, neither is an appropriate sanction for Dodge's contempt. *See, e.g., Johnson*, 304 Ariz. Adv. Rep. at 26, ¶ 13 n.2. Therefore, insofar as these terms in the Hendrix Order purport to be contempt sanctions they are invalid as such, and we modify them to strike the trial court's language ordering Dodge to comply with them to purge his contempt. However, insofar as scheduling and payment facilitates supervised visitation, and the amount of visitation restates what we affirmed in *Dodge I*, we decline special action jurisdiction because these terms as modified do not adjudicate contempt and therefore may be appealed. *See Elia*, 277 Ariz. Adv. Rep. at 11, ¶ 30, 977 P.2d at 802, ¶ 30.

¶ 27 The Hendrix Order also included an award to the Gravilles of their reasonable attorneys' fees. The Gravilles brought this contempt proceeding to enforce the Keppel Order which granted them visitation rights under A.R.S. section 25-409. In any action under A.R.S. chapter 25, the court may award fees. *See* A.R.S. § 25-324; *see also Brooks v. Consolidated Freightways Corp.*, 173 Ariz. 66, 70-74, 839

P.2d 1111, 1115-19 (App. 1992) (affirming attorneys' fees awarded in a contempt proceeding under A.R.S. § 12-2454 (1956), renumbered as A.R.S. § 25-504 (1996)). Therefore, we accept jurisdiction and deny relief as to the trial court's award to the Gravilles of their attorneys' fees.

III. *Fundamental Error*

¶ 28 Dodge finally argues that the trial court committed various errors that are not reversible individually, but cumulatively rise to the level of fundamental error. Specifically, Dodge complains that there was no evidence of contempt, that the court failed to consider Dodge's defense, that the court did not separate its finding into constitutional and unconstitutional elements, and that the court abused its discretion by not allowing closing arguments and finding him in contempt without evidence. We find no merit in these claims.

¶ 29 "Fundamental error is that which goes to the very foundation of a case, or takes an essential right from a party, or deprives a party of a fair trial." *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 176 Ariz. 383, 387, 861 P.2d 668, 672 (App. 1993) (citations omitted). But, "[w]e recognize that the 'fundamental error' doctrine should be used sparingly, if at all, in civil cases." *Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997).

¶ 30 Here, the testimony supported the court's finding that Dodge had prevented the Gravilles from seeing their granddaughters twice each month for four to eight hours at a time, and that Dodge had not told the Graville's of

his changed address and telephone number, as required by the visitation order. Dodge provides only one brief excerpt from the record and no argument or citation to authority showing that the court erred by failing to consider Dodge's defense or hear closing arguments. Therefore, we reject these claims. *See* Ariz. R. Civ. App. P. 13(a)(6); *Paros v. Hoemako Hosp.*, 140 Ariz. 335, 338, 681 P.2d 918, 921 (App. 1984); *Coggins v. Wright*, 22 Ariz. App. 217, 219, 526 P.2d 741, 743 (1974). We have already explained the valid basis for the Hendrix Order. Therefore, we find no fundamental error.

Conclusion

¶ 31 For the reasons stated above, we accept special action jurisdiction and deny relief from the trial court's finding that Dodge was in contempt of court and from its award to the Gravilles of their attorneys' fees. We modify the contempt order by striking the language imposing terms in the order as penalties for contempt. We decline special action jurisdiction to review the Hendrix Order in any other respect. Under A.R.S. section 25-324, we award the Gravilles their reasonable attorneys' fees incurred on this special action upon compliance with Arizona Rules of Procedure for Special Actions 4(g) and Arizona Rules of Civil Appellate Procedure 21.

/s/ Michael D. Ryan
MICHAEL D. RYAN, Judge

CONCURRING:

/s/ Sheldon H. Weisberg
SHELDON H. WEISBERG, Presiding Judge

/s/ E.G. Noyes, Jr.
E.G. NOYES, JR., Judge

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

KATHRYN LUCILLE GRAVILLE and DONALD GRAVILLE, Petitioners-Appellees, v. DOUGLAS PAUL DODGE, Respondent-Appellant.	Case No.: 1-CA-CV 99-0582 (Maricopa County Superior Court Case No. DR97-90192)

PETITION FOR REVIEW

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Appellant Douglas Paul Dodge ("Dodge" or "Appellant") petitions the Supreme Court of Arizona to review the decision of the Arizona Court of Appeals in this matter. The Court of Appeals rendered its Opinion in this matter on May 23, 2000, a copy of which is included as Appendix I.

I. ISSUES PRESENTED FOR REVIEW

(Nos. 1 through 6 and 8 were reviewed by the Court of Appeals; Nos. 7, 9 and 10 were not reviewed by the Court of Appeals:)

1. Is the Hendrix Order vague and impossible to interpret, apply, or enforce? What does it authorize a court-appointed "intervention" psychologist to do and what limits does it place on his scope of action?

2. Did the Trial Court properly rely on ARS § 25-410 for authority to appoint Dr. Block the "Intervention" psychologist? Does this statute, which is crafted for other situations, apply to grandparent visitation? If it does apply in theory, did the court make the required requisite findings to invoke this statute?

3. Is there any other statute for state sponsored psychological intervention in the context of a grandparent vs. parent dispute?

4. Is the portion of the Order dealing with Dr. Block (the "intervention" psychologist) an unconstitutional infringement on the parent's (Appellant's) fundamental right to custody and control?

5. Is the portion of the Order dealing with Dr. Block (the "intervention" psychologist) an unconstitutional infringement on the children's right to be free of state-sponsored thought control?

6. Does the portion of the Order dealing with Dr. Block ("intervention" psychologist) improperly delegate the Court's authority to make and craft orders by giving the "intervention" psychologist unfettered discretion to

decide what actions to take in accomplishing the Court's stated purpose?

7. Does the Court of Appeals' Decision in this case represent an impermissible intrusion across the bright line between judicial and legislative powers as defined by the Arizona Constitution?

8. Did the Court of Appeals, when it found that the threshold requirements for ARS § 25-410(B) had been met, make a finding of fact which the trial court had already declined to do and for which, in any case, there exists no supporting evidence in the record?

9. Does the timely release of the United States Supreme Court Opinion in *Troxel v. Granville* No. 99-138 (argued January 12, 2000; decided June 5, 2000) void the appeals court action since the Keppel and Hendrix court failed to provide Dodge with due process as defined by USSC opinion.

10. Are ARS § 25-409 and both ARS § 25-414 and ARS § 25-410 in any application in third party disputes, facially unconstitutional because none of these statutes provide for proper "special weight" to a fit parent's opinion of what is in the best interests of the children.

* * *

MOTION FILED
MAY 25 2001.

(3)

No. 00-1300

IN THE
SUPREME COURT OF THE UNITED STATES

DOUGLAS PAUL DODGE,

Petitioner,

v.

KATHRYN LUCILLE & DONALD GRAVILLE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF AARP IN OPPOSITION TO PETITION FOR CERTIORARI

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14 pp

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF RESPONDENTS

AARP moves for leave to file the accompanying brief amicus curiae in support of the position of Respondents in opposition to the Petition for Writ of Certiorari in the case of *Graville v. Dodge*, which is before the Court from the judgment and opinion of the Arizona Court of Appeals.

Pursuant to Supreme Court Rule 37.3, AARP counsel sought consent of the parties to the filing of the brief. Counsel for the respondents granted consent. Counsel for petitioner withheld consent.

AARP is a national nonprofit membership organization of persons age fifty and older with approximately 34 million members in the United States. AARP's research indicates that approximately seventy percent of Americans over age 50 are grandparents. The AARP Grandparent Information Center, established in 1993, serves as a national resource center for grandparents who are raising their grandchildren. Moreover, the AARP Research Group has recently conducted an extensive study regarding grandparent visitation.

The issue of constitutionality of the best interest of the child standard in grandparent visitation statutes is of great importance to AARP and many of its members. AARP recently filed an amicus brief in the Court's grandparent visitation case, *Troxel v. Granville*, 530 U.S. 57 (2000). The AARP amicus brief in *Troxel* included an analysis and comparison of all fifty grandparent visitation statutes nationwide. Following the *Troxel* decision, AARP filed amicus briefs in grandparent visitation cases before several state courts. AARP respectfully requests that this Court grant AARP permission to file an amicus brief to address the ways

in which the instant case differs from the *Troxel* case previously before this Court.

May 25, 2001 Respectfully Submitted,

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No. 00-1300

IN THE

Supreme Court of the United States

DOUGLAS PAUL DODGE,
Petitioner,

v.

KATHRYN LUCILLE & DONALD GRAVILLE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF *AMICUS CURIAE* OF AARP IN OPPOSITION TO PETITION FOR CERTIORARI

INTEREST OF *AMICUS CURIAE* [1]

AARP is a national nonprofit membership organization of more than 34 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Approximately seventy percent of older Americans are grandparents. AARP & The Roper Organization, *Mature America in the 1990s: A Special Report from Modern Maturity Magazine and the Roper Organization*, MODERN MATURITY, 1995. The AARP Grandparent Information Center, established in 1993, serves as a national resource center for grandparents

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[1] In compliance with Rule 37.6 of this Court, *amicus curiae* AARP states that no counsel for any party authored this brief in whole or in part, and that no party or entity other than this *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

who are raising their grandchildren. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens.

ARGUMENT

This brief addresses the second question raised by the Petitioner in his Petition for Writ of Certiorari, *i.e.*, whether the Arizona grandparent visitation statute, ARIZ. REV. STAT. ANN. § 25-409 (West 1994), violates the United States Constitution.

TROXEL V. GRANVILLE DID NOT INVALIDATE THE ARIZONA GRANDPARENT VISITATION STATUTE

The Court should not take certiorari in the instant dispute because the appeal of the issue of the constitutionality of the grandparent visitation statute was not properly preserved. The Arizona Court of Appeals ruled that the Arizona grandparent visitation statute is constitutional in a 1999 decision in this case that the Petitioner failed to appeal to this Court. *Graville v. Dodge*, 985 P.2d 604, 611-612 (Ariz. Ct. App. 1999), *review denied*, No. CV-99-0091-PR (June 16, 1999). In subsequent rulings in this matter before the Arizona courts, Petitioner continued to challenge the constitutionality of the statute. The Arizona Court of Appeals did not address the constitutionality of the statute in the instant appeal because the issue was not preserved for review. *Graville v. Dodge*, 5 P.3d 925, 929 n.2 (Ariz. Ct. App. 2000), *review denied*, No. CV-00-0225-PR (Dec. 5, 2000).

Petitioner suggests that his failure to appeal the earlier ruling on the constitutionality of the statute should be excused because the Court's recent decision in *Troxel v. Granville*, 530 U.S. 57 (2000), mandates the invalidation of the Arizona statute. Petition for Writ of Certiorari ("Petition") at 17. In fact, the *Troxel* decision was quite clear that its ruling did not extend beyond the Washington visitation statute. Both the plurality decision of Justice O'Connor and the concurrence of Justice Souter explicitly stated that the *Troxel* case did not even

address whether a showing of harm was required in other states' grandparent visitation statutes. 530 U.S. at 73 (O'Connor, J., plurality); *id.* at 77 (Souter J., concurring).

Petitioner argues that his case and the *Troxel* case are "hard to distinguish." Petition at 17. This argument is without basis. In fact, there is very little in common between the instant case and the *Troxel* matter. The Washington and Arizona statutes are markedly different, and the facts are not similar.

The constitutional defects that the Court identified in the Washington statute in *Troxel* are not present in the Arizona grandparent visitation statute. The Washington statute applied to any person; the Arizona statute applies only to grandparents and great-grandparents. The Washington statute applied to all children; the Arizona statute confers visitation rights only to children whose parents are divorced, unmarried, or deceased. The Washington statute listed no factors to be considered in determining the child's best interest; the Arizona statute delineates several factors, including the historical relationship between the child and grandparents. *Compare* ARIZ. REV. STAT. § 25-409, *with* WASH. REV. CODE § 26.10.160 (1994) (amended 1996).

Thus, the Arizona statute is unlike the "breathtakingly broad" Washington statute. *See Troxel*, 530 U.S. at 67 (O'Connor, J., plurality). Indeed, in an unrelated case not appealed to the Court, the Arizona appellate court concluded that the Arizona statute did not suffer from the constitutional infirmities identified in *Troxel*. *Jackson v. Tangreen*, 18 P.3d 100, 103 (Ariz. Ct. App. 2000).

Moreover, the facts of this case are quite different from *Troxel*. In *Troxel*, the children had never resided with the paternal grandparents, and they had always resided with their mother. In the instant case, the children resided with and were raised by the maternal grandparents for several years, and the father did not reside with the children for several years.

An increasing number of children in this country are living with their grandparents. The Census Bureau reported that the

number of children residing in households headed by grandparents increased from 2.2 million children in 1970 to 3.9 million in 1997, an increase of 75 percent. This demographic change has included a recent increase in the number of grandparents raising grandchildren. One million four hundred thousand children live in a household where neither parent is present and the grandparent assumes the role of primary care giver. TERRY A. LUGAILA, U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, P20-514, CURRENT POPULATION REPORTS: MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE) iii, tbl. A (1998). Recognition of the changing demographics of American society, including the heightened role of grandparents in raising children, led to the passage of grandparent visitation statutes in all 50 states.[2/] Indeed, Justice

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[2/] *See* ALA. CODE § 30-3-4.1 (1989); ALASKA STAT. § 25.20.065 (Michie 1998); ARIZ. REV. STAT. ANN. § 25-409 (West 1994); ARK. CODE ANN § 9-13-103 (Michie 1998); CAL. FAM. CODE § 3104 (West 1994); COLO. REV. STAT. §19-1-117 (1999); CONN. GEN. STAT. § 46b-59 (1995); DEL. CODE ANN. tit. 10, § 1031(7) (1999); FLA. STAT. ANN. ch. 752.01 (West 1997); GA. CODE ANN. § 19-7-3 (1991); HAW. REV. STAT. § 571-46.3 (1999); IDAHO CODE § 32-719 (1999); ILL. COMP. STAT. 750/5-607 (West 1998); IND. CODE § 31-17-5-1 (1999); Iowa Code § 598.35 (1999); KAN. STAT. ANN. § 38-129 (1993); KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin 1990); LA. REV. STAT. ANN. § 9:344 (West Supp. 2000); LA. CIV. CODE ANN., art. 136 (West Supp. 2000); ME. REV. STAT. ANN. tit. 19A, § 1803 (West 1998); MD. CODE ANN., FAM. LAW § 9-102 (1999); MASS. GEN. LAWS ch. 119, § 39D (1996); MICH. COMP. LAWS ANN. § 722.27b (West Supp. 1999); MINN. STAT. § 257,022 (1998); MISS. CODE ANN. § 93-16-3 (1994); MO. REV. STAT. § 425.402 (Supp. 1999); MONT. CODE ANN. § 40-9-102 (1997); NEB. REV. STAT. § 43-1802 (1998); NEV. REV. STAT. § 125C.050 (Supp.1999); N.H. REV. STAT. ANN. § 458:17-d (1992); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1999-2000); N.M. STAT. ANN. § 40-9-2 (Michie 1999); N.Y. DOM. REL. LAW § 72 (McKinney 1999); N.C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N.D. CENT. CODE § 14-09-05.1 (1997); OHIO REV. CODE ANN. §§ 3109.051, 3109.11 (West Supp. 1999); OKLA. STAT. tit. 10, § 5 (Supp. 1999); OR. REV. STAT. § 109.121 (1997); 23 PA. CONS. STAT. §§ 5311-5313 (1991); R.I. GEN. LAWS §§ 15-5-24 to 15-5-24.3 (Supp. 1999); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. Supp. 1999);

(continued...)

O'Connor's plurality opinion in *Troxel* stated: "Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties." 530 U.S. at 64.

Over half of the nation's grandparent visitation statutes require courts to consider the strength of the relationship between the grandparents and grandchildren prior to awarding visitation. Arizona's statute directed the court's attention to the historical relationship between grandparents and grandchildren. The Arizona court correctly concluded in this case that because "maternal relatives had been a vital influence on the children and had seen them on almost a daily basis for several years, eliminating those relationships would likely be detrimental to the well-being of the children." *Graville v. Dodge*, 985 P.2d at 613.

Petitioner minimizes the strong bonds between the Respondents and their grandchildren, calling the Respondents "genetic grandparents." Petition at 16. Legislatures in many states were deeply concerned by the hostility of custodial parents to a former spouse's parents. For example, in Michigan, the legislative history notes: "Many grandparents report that they have been cruelly prevented from maintaining contact with their grandchildren by the animosity of former children-in-law and their new spouses." H. LEGISLATIVE ANALYSIS SECTION FOR S. 439 & 440 (Mich. 1982). *See also* 21 S. PROC., Pt. 2, 1978 Sess. 33-34 (Conn. 1978); *Hearing on LB 105 Before the Senate*, 89th Leg., 1st Sess. 87-90 (Neb. 1985). Thirty-one states' statutes, including Arizona's

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[2](...continued)
S.D. CODIFIED LAWS § 25-4-52 (Michie 1999); TENN. CODE ANN. §§ 36-6-306, 36-6-307 (Supp. 1999); TEX. FAM. CODE ANN. § 153.433 (West Supp. 2000); UTAH CODE ANN. § 30-5-2 (1998); VT. STAT. ANN., tit. 15, §§ 1011-1013 (1989); VA. CODE ANN. § 20-124.2 (Michie 1995); WASH. REV. CODE §§ 26.09.240, 26.10.160 (1998); W. VA. CODE §§ 48-2B-1 to 48-2B-7 (1999); WIS. STAT. §§ 767.245, 880.155 (1993-1994); WYO. STAT. ANN. § 20-7-101 (Michie 1999).

grandparent visitation statute, explicitly provide that petitions for grandparent visitation shall be permitted after the adoption of the child by a step-parent.[3/] As noted throughout the legislative history of the 50 states' grandparent visitation statutes, the objective of these statutes is solely to protect the well-being of the nation's children by preserving important bonds between children and their grandparents.

CONCLUSION

For the reasons stated, amicus AARP urges the Court to deny the petition for certiorari in this case.

May 25, 2001

Respectfully submitted,

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[3/] These states are Alabama, Alaska, Arizona, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, West Virginia, and Wyoming.

(4)

No. 00-1300

Supreme Court, U.S.
FILED
JUN 1 2001
CLERK

In The

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Douglas Paul Dodge,
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v.
Kathryn Lucille and Donald Graville,
Respondents

Reply to Brief in Opposition
to Petition for Writ of Certiorari
To The Arizona Supreme Court

REPLY TO BRIEF IN OPPOSITION

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REPLY to Brief in Opposition

Per United States Supreme Court Rule 15.6 this is a reply to new points made in the Brief in Opposition submitted in the instant case, 00-1300. The intent of this reply is to point out where the Petitioner feels mistakes in law and fact were made in the Brief in Opposition. Points will be taken in their order of appearance in the Respondent's Brief in Opposition.

Timeliness of Question 2

The first issue lies on Page 1 of the Respondents Brief in Opposition questioning whether a timely constitutional challenge was made of to one of Arizona's third party visitation statutes, ARS §25-409, during the appeal that led to the Petitioner's Petition for Writ of Certiorari. To support this position the Respondents place in the appendix (pages App 20 and App 21) just two pages from the Petitioner's Petition for Review to the Arizona Supreme Court ignoring the body of that petition and the opening brief to the Appeals Court.

The Respondents ignore the entire section starting on page 20 of the Opening Brief labeled Item "C Unconstitutional Application of Arizona's Grandparent Visitation Statute". Quoting from this section briefly "The Hendrix order goes far beyond the surviving portions of the Keppel [order] in substantially interfering with Dodge's

right of custody and control" Clearly this is an open invitation for the court to take up the constitutionality of the grandparent visitation statute. The Arizona Appeals Court recognized that this was a constitutional challenge when it replied in paragraph [44] of its opinion (contained in the Appendix of the Petitioner Petition for Writ of Certiorari. Since this was a matter that was timely petitioned to the Arizona Supreme Court and then the United States Supreme Court clearly this issue is separate and not to be confused with either ***Jackson v. Tangreen***, quoted by the Respondent, or ***Graville v. Dodge I.***

The fact that the Arizona Appeals Court has ruled on this issue twice in the past does not mean that either ruling was correct or that it prevents the United States Supreme Court from considering the question.

What does "therapeutic intervention" mean?

The Respondent on page 3 makes much of alternate definitions, stated without authority, of what the court instructions to the psychologist in the instant case, meant or should have meant. Not withstanding the Respondent's ignoring of psychological, legal, and conventional dictionaries available in the public domain the Petitioner's position is that the meaning does not matter.

In fact what is clear are two pertinent facts concerning the Hendrix order. First that this was instruction from the court to a medical profes-

sional. Secondly that the professional was given total control over the treatment of the Petitioner's children without regard for the Father's or the children's mother's position on whether this treatment was helping or harming the children. The Father was ordered to provide unfettered access to Dr. Block of the children, on Dr. Block's time frame, for what ever purpose Dr. Block decided was appropriate, and as frequently as Dr. Block desired. Only the court could change the course of the treatment and the provider of the treatment, no matter how apparently harmful this treatment might have been to the children. It does not matter whether the care provider, Dr. Block would be motivated by good or bad intentions, there is simply no protection to the children in this arrangement.

The Respondents do include the unpublished opinion in ***Dodge v Supreme Court of AZ***, 1 CA-SA 99-0235 in their appendix. The Arizona Appeals court in this case found great difficulty with the never ending control of the Dodge Family life contained in the Hendrix order and while only considering a narrow portion of this order the court struck (¶26 on page App 15 of the Respondent's Brief in Opposition) as invalid all provisions that asserted never ending control being vested in a court appointed psychologist.

Fitness of the Parents

The Respondent, on page 4, distorts Judge Hendrix's statements by stating, "the presumption of the parent, as a fit parent, ...had been burst." Clearly Judge Hendrix said nothing of the sort. That the Father is a fit parent, as explained in the Petition for a Writ of Certiorari had been stipulated by the Respondents, not once but several times. The State of Arizona approved the adoption of these children by the Petitioner's wife with all the attendant background checks mandated by Arizona law. Both the states of Arizona and Washington thoroughly evaluated the Father in the process of licensing him as a peace officer in their states. Finally the State of Arizona requires by law a dependency hearing **prior to declaring a parent unfit** where unfitness must be proved by clear and convincing evidence. The Respondent on the other hand would have you believe that disagreeing with a judge over whether third party visitation is or is not in the best interest of the children would constitute the definition of parental unfitness. Or perhaps the Respondent believes that accessing constitutionally mandated remedies in law, such as filing an appeal to protect one's children from harm constitutes parental unfitness.

In fact there are no allegations of abuse or neglect, simply because the Dodge's are exemplary parents! If anything Mr. Dodge finds himself addressing the United States Supreme Court due to his overwhelming desire to protect his children from harm due to action of perhaps well meaning but certainly uninformed and mis-

guided 3rd parties. A complete reading of the record makes it clear that Mr. Dodge never withheld visitation, merely temporarily suspended for good cause.

The Respondents and their attorney make this allegation of unfitness without cited authority because there is nothing to support such a preposterous statement. Justice Souter in his concurring opinion in ***Troxel v. Granville*** stated, "It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent."

When one can become an unfit parent merely by differing in opinion with an uninformed third party, certainly more than the 14th amendment to the US Constitution is offended. In fact this one statement by the Respondent is completely illustrative of what is truly wrong in this case.

The Arizona judicial system is treating the Petitioner not as the fit parent he is but rather as a defacto unfit parent, ordering dubious professional treatment with no diagnosis or pretense that this treatment is somehow necessary to prevent harm to a child. The treatment is apparently only perceived as beneficial to achieving some goal of the state unrelated in any meaningful or demonstrable way to the children's welfare. The natural protection provided by involved fit parents is to be supplanted by a remote and uncaring court that cannot even find time to interview the subjects involved most directly in

this exercise, the children.

The Respondent and others (AARP) imply or state incorrectly that this case was one where grandparents that cared for children were stripped of their contact by death of the natural mother. The reality is now being obscured by five contentious years of litigation can, however, be obtained by carefully reading the record. The Respondent's were never in *loco parentis* to the children. If they had been most likely they would have attempted to establish such a status, as many Arizona litigating grandparents do, under ARS § 25-415 C. The pertinent part of this statute is as follows, "C. The superior court may grant a person who stands in loco parentis to a child, including grandparents and great-grandparents, who meet the requirements of section 25-409 reasonable visitation rights to the child....."

The Respondents had substantial, even generous (more than they were awarded by the court) contact with the children after the death of the mother. This visitation was suspended due to nightmares, grandparent mis-behavior, and other signs of stress being caused by the visits. The Respondents prior to trial refused to consider a substantial offer of visitation to the point that in fact under the current interpretation of ARS §25-409 contained in ***Jackson v. Tangreen*** they would have no status whatsoever to petition the court for visitation.

At the time of Trial the Step Mother had not adopted the children

The Arizona court system and the Respondents place considerable weight on this fact on page 7. The reality was that the adoption was in process at the time of trial, the Respondents knew about it, and it was a race to the courthouse where the parent's had no control of the outcome. Only the State of Arizona could control the timing. The parents lost the race by one month. It seems unreasonable to the parents that the outcome of their attempts to shield their children from harm should hinge on a bureaucratic controlled race to the court house. While winning this race may have saved the parents a great deal of hassle, pain, and cost (and maybe it wouldn't considering the starkly different positions taken by the Arizona Appeals Court on stepparent adoption in just 5 years from ***Guethe v. Truscott***, to ***Dodge v Superior Court of AZ***, and now ***Jackson v. Tangreen***). The Petitioner cannot see any logic why the Respondent sees this fact as having any relevance to the instant Petition.

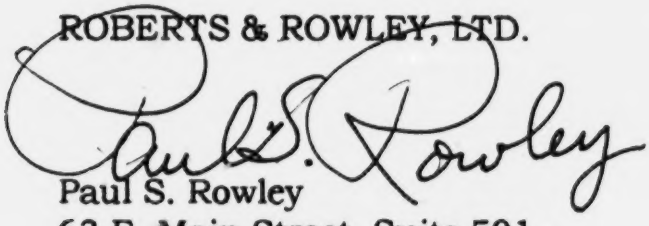
Conclusion

The rulings in the Arizona Courts remain inconsistent with ***Troxel v. Granville***. Often Arizona judges, with the encouragement of the Ari-

zona Court of Appeals, maintain that ***Troxel v. Granville*** does not apply for a wide variety of reasons. The issues brought up in this Petition for Writ of Certiorari remain a load to endure for many others unable to afford the heavy burden of years of litigation endured by the Petitioner. For this and the above reasons along with those previously stated in the Petition for Writ of Certiorai the Petitioner, Douglas Paul Dodge requests the court to accept its Petition for Writ of Certiorari and to rule accordingly.

RESPECTFULLY SUBMITTED this 1st day of June, 2001.

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